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89-943

No. ——

DEC 13 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS J. KLINE, INC.,
Petitioner,
v.
LORILLARD, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below erred in reversing a plaintiff's jury verdict under the Robinson-Patman Act because the court refused to equate unjustified discrimination by a commodities supplier in the trade credit available to competing wholesaler customers with price discrimination.

2. Whether the court below erred in holding that the trial court had clearly abused its discretion in admitting, over no objection, the expert testimony of an economist with a Masters Degree in Business Administration from the University of Chicago.

3. Whether the court below erred in reversing a plaintiff's jury verdict for breach of a requirements contract because the court rejected parol evidence that language in a letter expressed quantity sufficient to satisfy the Statute of Frauds of the Uniform Commercial Code, contrary to its authors' directive that such evidence is paramount.

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OPINIONS BELOW

The June 30, 1989 opinion of the United States Court of Appeals for the Fourth Circuit is reported at 878 F.2d 791. (App. 1a-22a).

JURISDICTION

The opinion sought to be reviewed was entered on June 30, 1989. Following a timely petition for rehearing, and suggestion for rehearing in banc, the Court of Appeals denied said petition on September 14, 1989. (App. 66a). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. *Provided*, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . .

The Maryland Antitrust Act, § 11-204(a)(3), Commercial Law Article (1983), provides:

> *Prohibited conduct.*—A person may not:
>
> Directly or indirectly discriminate in price among purchasers of commodities or services of like grade and quality, if the effects of the discrimination may:
>
> i() Substantially lessen competition;
>
> (ii) Tend to create a monopoly in any line of trade or commerce; or
>
> (iii) Injure, destroy, or prevent competition with any person who grants or knowingly receives the benefit of the discrimination or with customers of either of them;

Rule 702, Federal Rules of Evidence (1984), provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

> evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Maryland Uniform Commercial Code—Sales, § 2-201(1), Commercial Law Article (1975), provides:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

STATEMENT OF THE CASE

The critically important issue this case presents is whether given the Supreme Court's long and emphatic line of holdings that payment now costs more than payment later, such that to sell on credit is to offer a discount in price, an appellate court may ignore a jury's finding that a seller engaged in illegitimate credit discrimination, and reverse a plaintiff's verdict under the Robinson-Patman Act.

A. The Facts

This case arose in early February, 1986, when Lorillard, Inc. ("Lorillard"), one of six major tobacco products manufacturers, abruptly discontinued sales to Thomas J. Kline, Inc. ("Kline")[1], then an Elkton, Maryland tobacco distributor, on the credit terms confirmed in a letter dated January 15, 1986.

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[1] Kline has neither subsidiaries nor affiliates.

This action was unprecedented in the 18-year relationship between Lorillard and Kline or its predecessor, Wm. B. Merrey & Sons, Inc. ("Merrey").[2] Moreover, while revoking Kline's credit, Lorillard liberalized that afforded Kline's competitors, extending payment schedules and increasing credit limits. Kline eventually was able to resume purchasing on credit, but with a strict limit of $60,000.00 secured by a letter of credit, for which it paid a fee.

Lorillard lacked any business justification for its act. The precipitating event, the bankruptcy of Merrey's former owner Paolella, was proved at trial to have nothing to do with Kline. Nor did Lorillard perform the rudimentary factual investigation that would have established Kline's good faith. Further, Lorillard knew its demand would destroy Kline. As Lorillard testified at trial, only "around two percent" of its customers paid cash in advance, or provided "hard security" instead. It was Lorillard's policy "to be as cooperative as possible" with its "thinly capitalized" distributors, there being no

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[2] Merrey was for a number of years prior to 1980 a family-run cigarette and sundries wholesaler owned by Mr. Thomas J. Kline, Jr. From the end of 1980, when Mr. Kline sold Merrey to Philadelphia-based distributor M. Paolella and Sons, Inc. ("Paolella"), to 1985, when he reacquired Merrey, it was managed by Mr. Kline as a separate division of Paolella. Through its history, Merrey purchased its requirements from Lorillard on open credit terms.

Mr. Kline sought to continue this relationship, an incident of direct dealer status as well as a prerequisite to profitable operations, after he repurchased his company in December 1985 and commenced to operate under the Kline name. Based on Merrey's long unblemished credit record, as well as the financial information submitted by Mr. Kline, Lorillard granted Kline's request to purchase on a direct basis so that it could obtain its reasonable Lorillard requirements on Lorillard's normal credit terms. On January 15, 1986, this was confirmed in a letter signed by Lorillard. (App. 4a-5a). No credit limitation is stated in this confirmation, and in fact no such limit was announced or applied prior to its abrupt withdrawal of Kline's credit.

"way of supplying and selling to those customers" except on credit.

Kline, like Lorillard's other wholesalers, could not derive a profit without trade credit. So Kline was forced to join the tiny minority providing to Lorillard a letter of credit—which Lorillard did not accept until March 3, 1986, a full month later. By that time, Kline had permanently lost market share to competitors to whom Lorillard granted liberalized credit, and who expanded their own customer bases to include Paolella's former customers with that help. Further, in view of the extremely low profitability of cigarette wholesaling, the price increase resulting from Kline's purchase of a letter of credit threatened ultimately to put it out of business entirely.

B. Proceedings Below

To avert this outcome, Kline filed suit in the Circuit Court for Cecil County, Maryland, under Maryland's versions of the Robinson-Patman Act [3], and the Sales Article of the Uniform Commercial Code [4], and for common law business torts.

Finding Kline's concerns compelling, the Cecil County Circuit Court ex parte enjoined Lorillard to grant unsecured credit to Kline up to $60,000.00 (App. 23a). Thereafter, Lorillard removed the action to the United States District Court for the District of Maryland, and Kline amended its complaint to assert the exclusively federal Robinson-Patman cause of action. A temporary restraining order was issued on April 15, 1986 (App. 23a) and on May 2, 1986, the District Court granted plaintiff's motion for a preliminary injunction (App. 24a), enabling Kline to remain in business during the litigation.

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[3] Maryland Uniform Commercial Code, § 11-204(3) (1983).

[4] Maryland Uniform Commercial Code, §§ 2-101 et seq. (1975).

Lorillard filed a motion for summary judgment on all counts of ~~the~~ amended complaint on June 1, 1987, which was denied by order and memorandum dated July 23, 1987. (App. 23a-38a).

A jury trial commenced on September 14, 1987. Lorillard's oral motion for a directed verdict at the close of plaintiff's case was granted as to the tort counts and denied as to the remaining claims. At the conclusion of all of the evidence, Lorillard's motion for directed verdict on the remaining counts was reasserted and again denied.

On September 23, 1987, the jury returned a plaintiff's verdict on the remaining counts, in the amounts of $1,000,000 for breach of contract and $526,733 for the Robinson-Patman violation. (App. 99a). On October 6, 1987, final judgment was entered pursuant to Fed.R.Civ.P. 54(b) in the amount of $2,053,466, plus interest and costs. (App. 39a-43a). Lorillard's motion for judgment notwithstanding the verdict or, in the alternative, for new trial or remittitur was denied by order and memorandum dated November 16, 1987. (App. 44a-50a). Thereafter, Plaintiff was awarded attorney's fees in the amount of $306,727.80. (App. 51a-61a). On December 15, 1987, an order was issued permanently enjoining and restraining Lorillard from unlawfully discriminating against the plaintiff with respect to price, including credit terms. (App. 62a-64a). Costs were taxed against Lorillard on January 28, 1988. (App. 65a).

Lorillard filed timely notices of appeal to the United States Court of Appeals for the Fourth Circuit, resulting in reversal on June 30, 1989, by a panel comprised of Judges Winter, Sprouse and Chapman. (App. 1a). In dissent from the opinion written by Judge Chapman, Judge Sprouse observed, with regard to Kline's Robinson-Patman claim:

> I believe that the principles concerning credit restrictions are controlled by *Catalano, Inc. v. Target*

Sales, Inc., 446 U.S. 643, 648 (1980) (per curiam), in which the United States Supreme Court stated:

> "It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price."

The general application of this proposition is illustrated by the Court's application of *Catalano* in the federal gift tax context in *Dickman v. Commissioner of Internal Revenue*, 465 U.S. 330, 337-38 (1984). This principle, when applied to the present case, requires that the credit restrictions imposed by Lorillard on Kline be viewed as equivalent to it charging a higher price.[5]

The panel, however, held that *Catalano* was not controlling (App. 14a), that as a matter of law Kline had not suffered discrimination "of any magnitude" (App. 15a), that Kline's expert should have been prohibited from testifying (App. 19a), and that the quantity requirement of the U.C.C.'s Statute of Frauds must be satisfied by a dictionary approved word (App. 8a), not in the context of the parties' actual usage. Substituting its judgment for the trial judge and jury's on all these issues, the panel reversed.

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[5] (App. 21a-22a). As to the contract question, the dissent states:

> Accepting as we must, Kline's testimony, Maryland's prerequisites for a requirements contract have been met. This is demonstrated by a fuller quotation from Cavalier Mobile Homes v. Liberty Homes, 53 Md. App. 379, 395, 454 A.2d 367, 377 (1983) in which the Maryland Court of Special Appeals indicated that the statute of frauds is satisfied "where the quantity term is not numerically stated, . . . some writing . . . indicates that the quantity to be delivered under the contract is a party's requirements." The jury, with a proper instruction and with the benefit of Kline's testimony about the language in the letter, specifically found that the letter expressed Lorillard's agreement to meet Kline's requirements. I agree, therefore, with the district court that there simply is no reason to disturb that jury finding.

(App. 21a).

Kline filed a timely petition for rehearing and suggestion for rehearing in banc, which was denied by the United States Court of Appeals for the Fourth Circuit on September 14, 1989. (App. 66a). Although not reflected in the record, Kline's business failed following vacation of the permanent injunction, with most of its customers acquired by one of the firms whose credit terms Lorillard liberalized when Kline's were withdrawn.

REASONS FOR GRANTING THE WRIT

As Lorillard testified at trial, fewer than two percent of its wholesale customers are denied open trade credit, although most of these are thinly capitalized and operating on extremely narrow profit margins. Indeed it is precisely because of the low profitability of cigarette distribution that Lorillard and its competitors extend credit so freely: wholesalers lack the cash reserves to pay their suppliers until they are paid by their own retail customers, and institutional lenders will not assume the risk.

Lorillard, however, like other manufacturers, is able to spread the risk of default, such as occurred when Paolella failed, by factoring the cost into its pricing structure. Seen in this light, trade credit is simply another way to offer a discount and is not the product of an objective evaluation of credit worthiness, as a bank might perform. The Supreme Court recognized this reality in *Catalano* when it held that an agreement among competitors to eliminate credit was a form of price fixing, unlawful on its face, and refused even to hear the defendants' offered justifications. The Court's opinion recognizes that credit decisions may be, and often are, efforts to disguise price manipulations and should be treated no differently.[6]

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[6] Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (1980).

Yet the Fourth Circuit, dismissing *Catalano* as "a "price-fixing case brought under the Sherman Act,"[7] elevates credit to the sacrosanct, permitting a supplier to escape scrutiny under the Robinson-Patman Act merely by invoking a business justification, even if, as here, the jury is convinced by contrary evidence that the discrimination was in fact illegitimate.

Because the opinion below creates a safe harbor for violation of the Robinson-Patman Act, enabling manufacturers who sell on time, which most undoubtedly do, to escape antitrust scrutiny by tampering with credit in lieu of price, and because this result contravenes direct precedent of this Court as well as the purpose of the Act, this is a case of exceptional national importance, meriting the grant of certiorari.

Also compelling review is the Fourth Circuit's introduction of an incomprehensible standard for admissibility of testimony of an expert, whose qualification was conceded at trial by Lorillard. As every other Circuit Court holds, where no articulable deficiency disqualifies a witness, which the Fourth Circuit concedes, it is within the discretion of the trial judge to admit the testimony.

Finally, the Fourth Circuit's decision that parol evidence is inadmissible to explain a writing offered to satisfy Section 2-201 of the Uniform Commercial Code warrants review because it creates a conflict with the decisions of other circuits, significantly undermining the uniformity and predictability that is the essential and salutary function of the Code.

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[7] **(App. 10a).**

I. The Decision That Unjustified Trade Credit Discrimination Is Beyond the Scope of the Robinson-Patman Act Is Inconsistent With Legislative Intent, In Direct Conflict With Decisions of the Federal Trade Commission and Other Circuits, and Irreconcilable With Holdings of the Supreme Court.

Not only *Catalano,* but a number of other Supreme Court opinions as well, underscore the equivalence of price and credit.[8] In *Catalano,* the Court held that a horizontal agreement among competitors "to terminate the practice of giving credit is . . . tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing." 446 U.S. at 648. Although the Fourth Circuit minimizes the significance of the price/credit equation, restricting *Catalano* to the price-fixing context, the Supreme Court's reasoning is global:

> It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price.

Id. As support for this "self-evident" proposition, the Court cited authority in the price discrimination area: "To charge cash and credit customers the same price is, economically speaking, to discriminate against the former." P. Areeda, *Antitrust Analysis,* 878 (2d ed. 1974).

The court below distinguishes *Catalano* as "a classic conspiracy case" while "here there is no allegation of conspiracy." (App. 14a). This distinction is meaningless. Whether single or multi-firm conduct, price discrimination or price fixing, is charged, the operative word "price" does not change meaning.

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[8] Last year, in Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988), the Court reaffirmed the longstanding "self-evident" principle that damage awards must be based on present value because "a given sum of money in hand is worth more than the like sum of money payable in the future." See also Chesapeake and Ohio Ry. Co. v. Kelly, 241 U.S. 485 (1916); Jones and Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983); St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985).

Although the Robinson-Patman Act does not define price, its prohibition of direct or indirect discrimination encompasses all differences in terms affecting the actual cost to buyers. As the Supreme Court held in *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 740 (1945), where the defendants allowed their favored customers to secure options for the purchase of glucose and to take delivery at prices in effect prior to announced increases for longer periods than other buyers:

> the present discriminations in terms of sale operated to permit the favored customers to purchase at a lower price than other customers, so that their only practical effect was to establish discriminations in price, precisely the evil at which the statute was aimed.

It is axiomatic and oft articulated[9] that a customer forced to pay cash today buys at a higher price than a customer who pays later. There is nothing in the Act that protects this particular form of price discrimination. By equating the extension of credit with the giving of a discount, the Court in *Catalano* placed credit discrimination squarely within the traditional ambit of the Robinson-Patman Act.[10] And indeed the federal agency with primary antitrust expertise, the Federal Trade Commission, affirmed by the Third Circuit has held that credit discrimination is a discrimination in price. In *Viviano Macaroni Company*, FTC Docket 8666, CCH Trade Reg. Rep. Paragraph 18, 246 (1968), aff'd, 411 F.2d 255 (3d Cir. 1969), the Commissioner found discriminatory a macaroni manufacturer's credit granting practices for reasons remarkably apt to Kline's situation:

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[9] See n.8, *supra*.

[10] See, e.g., U.S. v. Borden Co., 370 U.S. 460 (1962) (quantity discounts constitute direct price discrimination).

> Thus, one of respondent's large customers who was not offered the extended credit terms testified that "in 20 days, the chances are that the merchandise we would have bought would have been sold by that time, and in most cases the moneys would have been collected for it and, in effect, we would have been operating on Vimco's money" (tr. 346-347). He further stated that his company borrows short term money to enable it to meet discount terms of its suppliers and that "If we had an extra ten days, that would give us a half million dollars of extra capital in our business" (tr. 347). Several other nonfavored customers testified that an extension of credit to 2%-20 days would be significant and a definite advantage for the reason that this would enable them to sell the products before they have to pay for them, thus giving them more cash to use in other ways (tr. 314, 1094, 1118, 1208).
>
> Considering this testimony in light of the intensively competitive situation existing in the retail food industry, we find that respondent's discriminatory extension of credit terms to Loblaw, even considered separate and apart from the other discriminatory price reductions in its package deal, may have the effect of substantially lessening competition.

The circuit courts are less clear as to the appropriate treatment of credit discrimination, though none are as restrictive as the Fourth Circuit. The Sixth Circuit, after *Catalano*, holds that a manufacturer's refusal to extend credit "based upon valid business considerations does not violate § 2(a)", but requires the seller to demonstrate "the existence and application of business factors in making its credit decisions." *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1325-26 (6th Cir. 1983).[11] Only if a buyer truly cannot "submit any probative evidence" that credit distinctions are based on invalid considerations is the defendant entitled to judgment. *Id.* at 1326.

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[11] *Bouldis* is consistent with *Catalano* and with Section 2(a) of the Robinson-Patman Act insofar as it puts the burden on the

The trial court in Kline's case followed *Bouldis* in instructing the jury that:

> A difference in credit terms that is based on legitimate credit-granting criteria, however, such as the borrower's financial strength, business experience, credit history, net worth, capital, cash position, personal guarantees, and business success does not constitute price discrimination.
>
> If the plaintiff has not proved that the defendant gave other purchasers favorable credit terms that were not available to the plaintiff and that were not based on legitimate business reasons, then your verdict must be for the defendant.[12]

(App. 82a).

The Kline jury was not persuaded by Lorillard's articulated business justifications, and found Kline to have proved that Lorillard's disparate treatment of the plaintiff and its competitors was not based on legitimate credit-granting criteria. (App. 97a) .

Nonetheless, the Fourth Circuit, quoting the pre-*Catalano* opinion in *Craig v. Sun Oil Co.*, 515 F.2d 221 (10th Cir. 1975), cert. denied, 429 U.S. 829 (1976), concludes that as "a matter of law the present case does not present an extreme situation or one of any magni-

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defendant to justify its discrimination by "differences in the costs of manufacture, sale, or delivery . . ." See Borden, supra, 370 U.S. at 467 (cost justification defense requires defendant to show "actual cost differences").

[12] Accord, Court's Instruction No. 30. (App. 133a). See also Cemar, Inc. v. Nissan Motor Corp., 678 F. Supp. 1091, 1101 (D. Del. 1988); Robbins Flooring, Inc. v. Federal Floors, Inc., 445 F. Supp., 4, 9 (E.D. Pa. 1977); Glowacki v. Borden, Inc., 420 F. Supp. 348, 354 (N.D. Ill. 1976); Carlo C. Gelardi Corp. v. Miller Brewing Co., 502 F. Supp. 637, 648 (D. N.J. 1980).

tude." (App. 15a). But no court, not even *Craig*,[13] has gone so far as the Fourth Circuit in shielding from scrutiny a seller's credit discrimination, because this is the first time a jury has found invidious price discrimination.

Ignoring the ample factual foundation for Kline's verdict,[14] the Fourth Circuit accepts at face value Loril-

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[13] The basis for the Tenth Circuit's holding in Craig was the plaintiff's apparent failure to allege that the defendant's credit distinctions were unjustified. 515 F.2d at 224.

[14] To briefly summarize hundreds of transcript pages, prior to Lorillard's revocation of Kline's credit privileges in early 1986, Mr. Kline had owned or managed the company for nearly 20 years. Throughout this period, Kline predecessor Merrey operated under the cigarette manufacturers' normal credit terms notwithstanding its rapid expansion. Further, it never failed to make a timely payment to any cigarette supplier, including Lorillard, always paying the bills at least on time and often early.

Indeed, Lorillard's close scrutiny of Merrey's payment history during these two decades unearthed only one instance and that back in 1979, when Merrey was asked and agreed to pay Lorillard invoices on shortened nine-day terms. There is no evidence indicating that Merrey had failed to meet the then twelve-day payment schedule, or that its credit history was in any respect clouded when the events of February 1986 transpired.

At trial, Lorillard offered no explanation why Paolella's January 1986 failure and the resulting foreclosure by Maryland National Industrial Finance Corporation ("MNIFC") rendered Kline uncreditworthy. And absent any reason to believe that Kline, with an unblemished credit record, was itself likely to default on its own loan from MNIFC, which Lorillard did not even assert, the whole point is an obvious pretext for Lorillard to vent its spleen on a former affiliate of Paolella, the firm whose bankruptcy caused Lorillard to lose substantial unpaid-for inventory.

The punitive and retaliatory nature of Lorillard's conduct is illuminated in the context of its disparate treatment of its other wholesale customers. In February 1986, while Kline was required to wire cash in advance, Lorillard granted liberalized credit to all other dealers requesting it, encouraging Kline's competitors to expand to fill the void left by Paolella.

But there was no legitimate basis to distinguish between these favored customers and Kline. According to Lorillard's expert lard's version of the story. (App. 15a-17a). Certainly, this appellate fact finding is contrary to fundamental standards of judicial review. But even more troubling, the decision below signals the path to evasion of the Robinson-Patman Act. If a seller wishes to discriminate among its customers, all it need do in the Fourth Circuit is confine the discrimination to the trade credit arena, and offer some business justification for its conduct. Once the requisite incantation is voiced, the defendant is secure in knowing that the plaintiff's contrary evidence is irrelevant.

The Supreme Court, having recently reaffirmed the continuing viability and importance of the Robinson-Patman Act,[15] should not permit its evisceration in this guise.

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economist, Dr. Linneman, who studied "in a systematic way the credit decisions being made by Lorillard", the majority of its customers "tend to be very what we call thinly capitalized, not a lot of equity, quite a bit of debt; and in just the normal relationships you have to work out some way of supplying and selling to those customers." Lorillard acknowledged that it demands cash in advance or hard security from only "around two percent" of these customers. Dr. Linneman described Lorillard's general credit-granting policy as "an attempt by Lorillard to be as cooperative as possible, to help their customers to be able to do business with them with a minimal amount of intervention." Its treatment of Kline was plainly a departure, as the jury found.

[15] In Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983), the Court described the Act's "prophylactic purpose" and its "general applicability [prohibiting] discrimination generally." *Id.* at 435-36. Applying Falls City and J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981), the Kline jury found Lorillard's conduct to result in competitive injury as well as antitrust injury to Kline. (App. 97a-98a).

II. The Decision to Disqualify Expert Testimony Admitted Without Objection Conflicts With Decisions of Other Circuits and is Contrary to the Federal Rules of Evidence Granting to the Trial Court Wide Discretion to Allow Such Testiomny.

At trial, Kline's expert Lilli A. Gordon testified regarding Lorillard's "business justification" for restricting Kline's credit and as to the substantiality of the resulting price differential, without objection from Lorillard. The Fourth Circuit, though it discerns no single fact that disqualifies Ms. Gordon (App. 19a), concludes nonetheless that the witness cannot satisfy even the minimal requirements of Fed. R. Evid. 702.

But as every other circuit holds, a trial court's decision to admit expert testimony is so broad that reversal depends on a showing of manifest abuse, not on the appellate court's undefined feeling that the expert is unqualified.[16]

The Fourth Circuit's decision is, moreover, directly at odds with the purpose of Rule 702 of the Federal Rules of Evidence, broadly defining an expert by reference to his possession of helpful "knowledge, skill, experience, training or education." Professor Rothstein describes "the intent of the rule . . . to increase receptivity to experts, and if there is any limit to the trial judge's discretion, it may be mainly a limit on discretion to exclude." Rothstein, *Federal Rules of Evidence* 268 (2d ed. 1987).

The trial court in Kline did not commit clear, or indeed any, error in allowing Ms. Gordon's testimony, as she was fully qualified. Ms. Gordon is an economist by education.[17] Her training prepared her "to analyze a company's financial data, for example, its balance sheet, its income statements, its cash flow statement, in order to make assessments of the financial viability or the financial health of firms and in order to be able to make comparisons of the financial wellbeing of one firm versus another."

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[16] See, e.g., U.S. v. Bermudez, 526 F.2d 89 (2d Cir. 1975), cert. denied, 425 U.S. 970; Barnes v. General Motors Corp., 547 F.2d 275 (5th Cir. 1977).

[17] Ms. Gordon's Master's Degree in Business Administration from the University of Chicago concentrated in economics, and included

As far as Ms. Gordon's pertinent employment experience as a financial economist since 1980 is concerned, it requires "analyzing firms, analyzing their financial data, trying to make assessments as to how profitable they are, how risky the business is, or else how profitable the business is, compared to its competitors, or how profitable a group of businesses are compared to, say, businesses in another industry for example." Beween one-half and three-quarters of her work involves antitrust issues, including price discrimination.

The court below's denial that Ms. Gordon's expertise in finance and accounting can assist a jury called upon to evaluate Lorillard's credit granting criteria and to compare its customers' balance sheets not only conflicts with the decisions of other circuit courts,[18] but seriously impairs the ability of antitrust plaintiffs to present their cases. If, as happened here, a financial economist with an advanced degree from the University of Chicago who is employed primarily in antitrust analysis and whose testimony is admitted without objection, can be disqualified for no precise reason on appeal, the chilling effect on antitrust enforcement is apparent.

Ph.D. courses in that subject. She has published on the subject as well.

[18] In Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982), aff'd, 465 U.S. 752 (1984), the Seventh Circuit affirmed the trial court's consideration of testimony as to antitrust damages by a witness experienced in damage computation, notwithstanding the witness' admitted lack of expertise in any of the fields of statistics, economics, cost accounting or computers used in preparation of his testimony. See also California Steel & Tube v. Kaiser Steel Corp., 650 F.2d 1001 (9th Cir. 1981).

Because this outcome results from a decision in conflict with the federal rules of evidence as well as uniform precedent, it merits review by writ of certiorari.

III. The Decision to Exclude Parol Evidence of the Meaning of Words in a Letter Offered to Satisfy the Statute of Frauds Is Contrary to the Uniform Commercial Code and In Direct Conflict With the Decisions of Other Circuits.

The Fourth Circuit holds that the statute of frauds set forth in Section 2-201 of Maryland's Uniform Commercial Code bars Kline's recovery for breach of contract because as a matter of law no quantity is stated in Lorillard's January 15, 1986 letter to Kline. According to the decision below:

> The January 15, 1986 letter from Lorillard to Kline[19] is totally silent as to quantity despite Kline's contention that the words "direct basis" indicate quantity. A standard definition of quantity is that it is 'a particular, indefinite, or considerable amount of anything, . . . an exact or specified amount or measure.' *Random House College Dictionary,* 1080 (1982). Precisely how one converts 'direct basis' into some variety of amount is not adequately explained. There simply is no arguable connection in the law or in the English language between "direct basis" and "amount." Under Maryland law, the testimony of Kline, that for a few weeks in December 1985 and January 1986, Lorillard had filled his orders and extended certain credits and discounts, did not supply the missing ingredient—some indication of quantity.

(App. 8a-9a).

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[19] The referenced letter was not the only Lorillard writing in evidence available to prove a requirements contract. Lorillard's internal forms on direct purchasing instruct its salesmen to "move as much of each customer's total business into standing orders to automatically satisfy the customer's inventory requirements . . ." This is entirely supportive of Kline's testimony that, by trade usage and custom, "direct basis" means "requirements".

The court's reasoning is clearly at odds with the language and spirit of the Code, which rejects this approach as inconsistent with its underlying purpose to "simplify, clarify and modernize the law governing commercial transactions," and to "permit the continued expansion of commercial practices through custom, usage and agreement of the parties. . ." Md. Comm. Code Ann. § 1-102 (2)(a)(b) (1975). In this regard, a "course of dealing between parties and any usage of trade . . . give particular meaning to . . . terms of an agreement." § 1-205(3). As the Official Comment to Section 1-205 explains:

> This Section makes it clear that:
>
> 1. This Act rejects both the "lay dictionary" and the "conveyancer's" reading of a commercial agreement. Instead, the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context which may explain and supplement even the language of a formal or final writing.

Where, as here, a requirements contract is concerned, the Code "applies to this specific problem the general approach of this Act which requires the reading of commercial background and intent into the language of any agreement . . ." § 2-306, Official Comment 1.

If even a formal or final document's language derives its definition from the "commercial context," this can be no less true of the words of an informal statute of frauds memorandum. Indeed, Section 2-202(a), following the Statute of Frauds section, provides that terms "with respect to which the confirmatory memoranda of the parties agree . . . may be explained", even if unambiguous, by "course of dealing or usage of trade (§ 1-205) or by course of performance (§ 2-208) . . ." As the Official Comment to Section 2-202 indicates:

1. This section definitely rejects:

(a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;

(b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and

(c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous.

Finally, the Statute of Frauds, § 2-201(1), itself refers to "the quantity of goods *shown* in" a writing, which contemplates consideration of extrinsic evidence of meaning, a matter to be demonstrated like any other fact.

At trial, Mr. Kline testified unambiguously that the terminology "direct basis" used by Lorillard in the January 15, 1986 letter meant, by reference to his long experience in the industry and to his extended prior dealings with Lorillard, that Kline would purchase its requirements from Lorillard. The Fourth Circuit's rejection of Kline's parol evidence and insistence on a dictionary approved quantity term does far more than distort the Maryland Commercial Code,[20] depriving Kline of its entitled judgment.[21] The opinion below conflicts with the decisions of other circuits on this issue, and thereby undermines the main objective of the Code, to promote "uniformity throughout American jurisdictions".[22]

---

[20] The Maryland Court of Special Appeals decision in Cavalier Mobile Homes v. Liberty Homes, Inc., 53 Md. App. 379, 395 (1983) does not support the Fourth Circuit. In Cavalier, a collection of separate sales invoices did not in themselves indicate "that quantity is to be measured by requirements." Kline's testimony, in contrast, directly connects specific words in the January 15, 1986 letter to trade usage and course of dealing, supplying the ingredient missing in Cavalier sufficient to satisfy the Statute of Frauds. (App. 21a). (J. Sprouse, dissenting).

These other courts hold, correctly, that the critical issue in interpreting an asserted quantity term is the intent of the parties. Thus in *Kansas Power & Light Co. v. Burlington Northern*, 740 F.2d 780, 789 (10th Cir. 1984), the Tenth Circuit, relying on parol evidence as to the purpose of a transaction, found the writing before it sufficient because when "one considers these facts, it would make no sense to read the contract as anything other than a requirements contract." Similarly, in *O.N. Jonas Co., Inc. v. Badische Corp.*, 706 F.2d 1161, 1164 (11th Cir. 1983), the Eleventh Circuit held "the yarn" sufficient to state quantity, because the "testimony at trial" so indicated. As that court observed:

> The official comments in the Uniform Commercial Code emphasize that this section mandates "the reading of commercial background and intent" into the

---

[21] As Maryland's Court of Appeals suggested in Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 549-50 (1977), one may be "precluded by the doctrine of equitable estoppel from asserting the statute." There was evidence introduced at trial to establish that Lorillard had caused Mr. Kline to repurchase Merrey at substantial cost, in reliance on Lorillard's commitment to supply Kline's reasonable requirements on credit. Indeed, the second Jury Interrogatory inquires whether "the plaintiff proved that Lorillard is precluded from asserting the writing requirement by estoppel?" The jury did not respond to this question only because it had already found as a fact that the January 15, 1986 letter contains a quantity term sufficient under Section 2-201.

[22] General Comment of National Conference of Commissioners on Uniform State Laws and The American Law Institute, I Uniform Commercial Code, Uniform Laws Annotated (1989), p. xv. The ALI instructs courts to apply the comments of the Code substantively, in furtherance of its uniformity creating function. Accord, Section 1-102(c), stating the U.C.C.'s purpose and policy to "make uniform the law among the various jurisdictions."

language of any agreement. U.C.C. sec. 2-306 official comment 1 ((1978). This provision precludes a finding that a contract for requirements is too indefinite, "since the quantity is determined by the actual good faith requirements of the particular party." U.C.C. sec. 2-306 official comment 2 (1978). Professor J.J. White concludes that under this provision:

> "A party who seeks to invalidate a requirements contract therefore bears a heavy burden. Certainly the mere existence of an open quantity term does not support invalidation, since indefiniteness is inherent in requirement contracts."
>
> J. White & R. Summers, Uniform Commercial Code 122 (1980).

The decision below represents the only judicial rejection of parol evidence that particular written words offered to satisfy the Statute of Frauds connote quantity. Because this holding is so clearly contrary to the spirit and function of the Uniform Commercial Code, creating conflict where consensus is desired, the Petition for its review should be granted.

CONCLUSION

For the foregoing reasons, we respectfully submit that a writ of certiorari be granted.

Respectfully submitted,

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DEC 13 1989
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CLERK

89-943 2
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS J. KLINE, INC.,
Petitioner,
v.
LORILLARD, INC.,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-3011

THOMAS J. KLINE, INC.,
Plaintiff-Appellee,

versus

LORILLARD, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Frederic N. Smalkin, District Judge—(CA-86-1088)

Argued: November 3, 1988 Decided: June 30, 1989

Before WINTER, SPROUSE, and CHAPMAN, Circuit Judges.

Franklin Poul (Debra Klebanoff, Stanley R. Scheiner, WOLF, BLOCK, SCHORR AND SOLIS-COHEN; Fenton L. Martin, James R. Chason, WHITEFORE, TAYLOR & PRESTON on brief) for Appellant. Louis Burton Price (Holly N. Lindeman, David R. Sonnenberg, MELNICOVE, KAUFMAN, WEINER, SMOUSE & GARBIS, P.A. on brief) for Appellee.

CHAPMAN, Circuit Judge:

On January 15, 1986, Lorillard, Inc., a tobacco products manufacturer, agreed to sell tobacco products to Thomas J. Kline, Inc. and granted Kline certain credit. In early February, 1986, it abruptly informed Kline that future orders would be filled only if accompanied by cash. A jury in the District of Maryland found that Lorillard's revocation of credit was both a breach of contract and a violation of the Robinson-Patman Act, 15 U.S.C. § 13 (1982). The verdict awarded Kline $2,053,466 in compensatory and punitive damages, and the court set attorney's fees of $306,727.80, and issued a permanent injunction against future Robinson-Patman violations. Lorillard appeals the breach of contract and Robinson-Patman verdicts. Alternatively, it submits that the damages awarded were improper. We reverse.

I.

Events relative to this dispute commenced long before 1986. From 1977 to 1980 Thomas J. Kline was the owner of William B. Merrey and Sons, Inc., an Elkton, Maryland tobacco distributor. In late 1980 Kline sold Merrey to M. Paolella and Sons, a large Philadelphia tobacco wholesaler. Over the next five years, Kline served as manager of Merrey, which had become a subsidiary of Paolella. Primarily because of his good relations with Paolella, Kline was able to repurchase Merrey in December 1985. In January 1986 Paolella went into bankruptcy, resulting in substantial losses to its cigarette suppliers, including Lorillard.

The enormous cost of Kline's purchase of Merrey, and the immediate business necessity of establishing purchasing agreements with leading tobacco manufacturers, required that Kline obtain operating funds. Kline first acquired from Maryland National Industrial Finance Corporation (MNIFC) a $3.75 million letter of credit backed largely by future inventory and accounts receivable. Kline also arranged to purchase cigarettes at wholesale prices from each of the six major cigarette manufacturers, including Lorillard. In December 1985 Lorillard granted Kline certain credit terms orally. A January 15, 1986 letter was written by Lorrillard to Kline explaining credit, regular terms and discounts for prompt payment. Briefly stated, the letter allowed Kline to order goods without immediately wiring cash and provided discounts if payments were either mailed or received within 15 days of invoice.

In late January 1986, the Lorillard-Kline arrangement underwent considerable change. The primary reason was Maryland National Industrial Finance Corporation's January 30 foreclosure of Paolella's demise impacted on Kline and Lorillard for several reasons. First, because MNIFC maintained the first lien on Paolella's inventory, including a large quantity of Lorillard brand cigarettes, Lorillard lost about $700,000 in the MNIFC seizure. Second, Paolella's collapse was a cue for tobacco distributors, including Kline, to begin a scramble for business left unserviced by Paolella's bankruptcy. This resulted in Kline submitting an unusually large $30,000 order to Lorillard on January 31. Kline acquired another tobacco distributorship in anticipation of increased business. Third, Lorillard believed that Paolella's creditor, MNIFC, was a "nervous lender." This raised Lorillard's fears that MNIFC might also foreclose on Kline. More seriously, Lorillard felt that Kline's last minute purchase of Merrey suggested a fraudulent collusion with Paolella. Although the parties disagree as to which of these factors was determinative, on either January 31 or February 3, when Lorillard received Kline's $30,000 order, it suspended the previous credit arrangement and required Kline to wire cash for its purchases. Within a few weeks Kline produced and Lorillard accepted a letter of credit and renewed 15 day terms for Kline's purchases. Kline argued at trial that in the period before he could obtain a letter of credit he was prevented from enjoying a unique opportunity to expand into the Philadelphia tobacco market.

II.

Appellant Lorillard contends that Kline's breach of contract claim is barred by Maryland's Statute of Frauds. MD. COMM. CODE ANN. §2-201 (1975).[1] There is no disagreement that the statute applies to this transaction, and that the only writing evidencing the deal is a confirmatory memorandum sent to Kline by Lorillard on January 15, 1986. The question is whether the Maryland Statute of Frauds bars recovery for breach of contract. The entire text of this writing states:

> January 15, 1986
>
> Mr. Thomas J. Kline
> President
> Thomas J. Kline, Inc.
> D/B/A W. B. Merry & Sons
> 555 Blueball Road
> Elkton, Maryland 21921
>
> Dear Mr. Kline:
>
> We are pleased to inform you that your request to purchase Lorillard products on a direct basis has been approved by our New Accounts Committee, and you have been added to our direct list of customers

---

[1] § 2-201 Formal requirements; statute of frauds

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

for Full Line as successor to W. B. Merry & Sons, Inc.

Our terms are:

REGULAR TERMS:

> 2% cash discount on invoices if payment is mailed no later than the 15th day after invoice date.

ANTICIPATORY DISCOUNT:

> 1.25% cash discount (total discount 3.25% is available if payment is RECEIVED at our remittance address no later than the 15th day after invoice date.

Enclosed is our price list No. 61, dated July 22, 1985 with supplements.

Each of our customers is assigned an individual computer processing number to be included when submitted phone or mail orders.

YOUR NUMBER IS: 159-378-000-2

Please mail your remittances to:

LORILLARD, INC.
P. O. Box 6390
Church Street Station
New York, NY 10249

In Maryland it is well established that a writing satisfies the requirements of the Statute of Frauds if (1) it evidences a contract for the sale of goods, (2) it is signed by the party against whom it is to be enforced, and (3) it specifies the quantity of goods to be sold. *Cavalier Mobile Homes v. Liberty Homes, Inc.*, 53 Md. App. 379, 395, 454 A.2d 367, 376-77 (1983). Because the writing obviously evidences the sale and was signed by

Lorillard's agent, the issue becomes whether the memorandum adequately "specifies the quantity of goods to be sold." More precisely, the requirement in Maryland is that there be "some writing which indicates . . . the quantity to be delivered." *Cavalier Mobile Homes*, 53 Md. App. at 395, 454 A.2d at 377.

Kline's position is that the memorandum references to "direct basis" and "Full Line" satisfactorily prove the quantity terms. Even Kline, however, admits that these terms are not in themselves clear as to Lorillard's contractual obligation. As a result, Kline testified as to the meanings of "direct basis" and "Full Line." Normally, such supplementation of a written memorandum should be permitted. MD. COMM. CODE ANN. § 2-202 (1975). In fact, Maryland expressly allows parol evidence of "course of dealing," "usage of trade" or "course of performance" to explain written memoranda, so long as such evidence does not contradict the plain language of an agreement.

In submitting parol evidence appellee contended that the words "direct basis" created an obligation to supply Kline with all of his tobacco requirements, and that they required Lorillard to provide Kline with credit for his requirements on 15-day terms. Kline also introduced testimony suggesting that such arrangements were traditional in the tobacco distribution business, and had always been the manner of business between himself and Lorillard. Conversely, Lorillard contended that such terms created neither a requirement contract nor unlimited credit. It argued that "direct basis" and "Full Line" merely entitled Kline to buy Lorillard products directly from the manufacturer.

Before evaluating whether this course of dealing evidence is sufficient, we must consider whether there is any language in the memorandum *itself* which might satisfactorily indicate "the quantity to be delivered." This initial inquiry is plainly required by Maryland's requirement of a *written* quantity term. The general rule is that "when quantity is not precisely stated, parol evidence is admissible to show what the parties intended as the exact quantity . . . but where the writing relied upon to form the contract of sale is totally silent as to quantity, parol evidence cannot be used to supply the missing quantity term." *Alaska Independent Fisherman's Marketing Assn. v. New England Fish Co.*, 15 Wash. App. 154, 159-60, 548 P.2d 348, 352 (1976). *Accord: Great Northern Packaging, Inc. v. General Tire & Rubber Co.*, 154 Mich. App. 777, 399 N.W.2d 408 (1986); *In the Matter of Estate of Warren Bert Frost*, 130 Mich. App. 556, 344 N.W.2d 331; *Cox Caulking & Insulating Co. v. Brockett Distributing Co.*, 150 Ga. App. 424, 258 S.S.2d 51 (1979).

A review of decisions on this point reveals that there is not a single Maryland case where terms similar to those used in Lorillard's memorandum have been found to be sufficient written evidence of quantity. In *Cavalier Mobile Homes*, the Court of Special Appeals held that even where extant *writings* included a series of individual contracts there was insufficient *written* evidence to prove the alleged quantity. *Cavalier*, 53 Md. App. at 395, 454 A.2d at 377. Other courts have come to identical conclusions. For example, Georgia's Court of Appeals recently held that an agreement which "merely delineated a schedule of prices and set forth the terms and conditions of sale which would apply if orders were made" did not, even with evidence of course of dealing, sufficiently specify quantity. *Integrated Micro Systems, Inc. v. NEC Home Electronics (USA), Inc.*, 174 Ga. App. 197, 198-99, 329 S.E.2d 554, 556-7 (1985). *See also Eastern Dental Corp. v. Isaac Masel Co., Inc.*, 502 F. Supp. 1354 (E.D. Pa. 1980) (quantities on separate invoices may not indicate requirements contract); *Doral*

Hosiery Corp. v. Sav-a-Stop, Inc., 377 F. Supp. 387 (E.D. Pa. 1974) (uncertain quantity of face of orders).

Also instructive are those cases in which ambiguous terms of quantity have been deemed sufficient to prove an enforceable contract. This course, for example, recently held that quantity was adequately identified when specific language "referred to meeting the purchaser's needs." *Barber and Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1280-81 (4th Cir. 1987). *See also Kansas Power and Light Co. v. Burlington Northern Railroad Co.*, 740 F.2d 780 (10th Cir. 1984) (writings mentioning possible maximum and minimum amounts of shipped coal sufficient to create requirements contract). It has been held that the words "the yarn" for "a potential program" could be sufficient written expression of quantity. *O.N. Jonas Co., Inc. v. Badische Corp.*, 706 F.2d 1161, 1163-64 (11th Cir. 1983). Courts have consistently found that words with some possible nexus to amount, including "all," "bags," or even customary terms such as lot numbers, can provide a basis for the admission of parol evidence. *See also Maryland Supreme Corp. v. The Blake Co.*, 279 Md. 531, 369 A.2d 1017 (1977) (written phrases "for the above mentioned project" and "throughout the job" are sufficient quantity terms).

The January 15, 1986 letter from Lorillard to Kline is totally silent as to quantity despite Kline's contention that the words "direct basis" indicate quantity. A standard definition of quantity is that it is "a particular, indefinite, or considerable amount of anything, . . . an exact or specified amount or measure." RANDOM HOUSE COLLEGE DICTIONARY, 1080 (1982). Precisely how one converts "direct basis" into some variety of amount is not adequately explained. There simply is no arguable connection in the law or in the English language between "direct basis" and "amount." Under Maryland law, the testimony of Kline, that for a few weeks in December 1985 and January 1986, Lorillard had filled his orders and extended certain credits and discounts, did not supply the missing ingredient—some indication of quantity.

Therefore, the district court erred in considering only whether "course of dealing" testimony could prove a requirements contract. The court did not give any attention to whether there was sufficient written language in the January 15 letter to allow the introduction of parol evidence. Maryland, by its adoption of the Uniform Commercial Code, has indicated its desire to avoid the unnecessary technicalities of earlier interpretations of the Statute of Frauds, but this is not a case where one party is simply pleading the Statute in order to avoid duties which its actions seem to have created. Here the issue is whether a one sentence letter obligates Lorillard to provide Kline with unlimited credit for its unlimited tobacco requirements. This is not a case where there is a lack of a "fixed" written quantity. The Code prevents such restrictions. Here there is a lack of something, anything, in the writing that might evidence the quantity dimension of Kline's claim. The Statute of Frauds was enacted to avoid the potential for injustice in precisely these circumstances. Parol evidence cannot create quantity out of thin air, where the writing relied upon to form the contract is silent as to quantity. The Maryland Statute of Frauds is a bar to Kline's breach of contract claim.

III

Appellant also asserts that the plaintiff did not prove a violation of the Robinson-Patman Act.[2] We find no au-

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[2] 15 U.S.C. § 13(a) provides, in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or re-

thority for the plaintiff's claim of a Robinson-Patman violation on the present facts. The trial court in its charge and in its order denying judgment n.o.v. relied upon certain dicta contained in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), *Craig v. Sun Oil Co.*, 515 F.2d 221 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976), and *Bouldis v. U. S. Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir 1983). These decisions, however, are not a sufficient foundation for the building of a jury issue of price discrimination.

Catalano was a price-fixing case brought under the Sherman Act and involved an agreement amount a number of beer distributors to eliminate short-term trade credit formerly granted to beer retailers, and to require the retailers to pay case in advance or on delivery. This was a classic horizontal agreement to fix prices, and as the court described it ". . . the archetypal example of such a [anticompetitive] practice. It has long been settled that an agreement to fix prices is unlawful *per se*." *Catalano*, 446 U.S. at 647. *Catalano* found that the extending of interest-free credit for a period of time was the equivalent of giving a discount equal to the value of the use of the purchase price for that period of time, but the decision turns on the agreement of a group of sellers to eliminate all credit to a group of buyers, and this is the behavior that the court found to be actionable under § 1 of the Sherman Act, *Catalano*, 446 U.S. at 648-49

In *Craig v. Sun Oil Co.* the court affirmed summary judgment in favor of the defendants on Sherman Act

---

sale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

and Robinson-Patman Act claims. Sun sold tires, batteries and accessories through one Claiborne. After Claiborne sold this business to Craig. Claiborne obtained another franchise from Sun and began operating at another location within the same city. After Craig's service station failed, he sued Sun and Claiborne, asserting that they conspired to destroy his business by means of price, credit and service discrimination. The court found that there was no attempt to monopolize, that there was no conspiracy to restrain trade and that there was neither price nor credit discrimination. It stated:

> The trial court concluded that although there may have been a dispute as to the facts relating to the credit terms and conditions arranged by Sun with Claiborne and those with plaintiff, this made no difference because the discrimination in credit terms as alleged could not, as a matter of law, be the basis for a claim under 15 U.S.C. § 13(a) or (e). We agree with this conclusion.
>
> It is obvious that differences in the borrower's financial strength, business experience, and many other factors bring about differences in the terms of credit, security required, guarantees, or other devices used by creditors under these circumstances. *See* Rea v. Ford Motor Co., 497 F.2d 577 (3d Cir.); Skinner v. United States Steel Corp., 233 F.2d 762 (5th Cir.); and Clausen & Sons, Inc. v. Theo. Hamm Brewing Co. 284 F. Supp. 148 (D. Minn.), reversed on other grounds, 395 F.2d 388 (8th Cir.). We do not say that there could not be a discrimination in credit of such magnitude or nature as to constitute a violation, but no such extreme situation was alleged here by any means. *Craig*, 515 F.2d at 224.

The plaintiff in the present action is trying to elevate the dicta contained in the last above quoted sentence to make a jury question of the reasonableness of every credit decision. Yet, we believe *Craig* does not support such a proposition. More accurate is the interpretation of *Craig* articulated in *Carlo C. Geraldi Corp. v. Miller Brewing Co.*, 502 F. Supp. 637 (D.N.J. 1980), where the court quoted with approval the language from *Craig* that ". . . differences in the borrower's financial strength, business experience, and many other factors bring about differences in the terms of credit." The court explained the practical effect of this language to be that:

> In other words, a manufacturer is free to extend different terms to competing purchasers so long as it makes its decisions in a non-discriminatory manner, i.e., the same standards of credit worthiness must be extended to all applicants for credit who are in competition with each other. A showing such as the one made by Geraldi in this case can, therefore, be rebutted by an "affirmative showing that the different terms resulted from legitimate business factors."

Id. at 647. As the New Jersey court recognized, the proper review of credit decisions is not reasonableness, as the plaintff argues, because a seller has the right to sell his wares for cash or on credit. Instead, the appropriate legal test is whether the same standards of credit worthiness are extended to all applicants for credit who are in competition with one another.

The third case relied upon by the plaintiff in the trial court is *Bouldis v. U. S. Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir. 1983). Bouldis was a stockholder and officer of Bold-Morr, a former Suzuki motorcycle dealership, and he brought an action against Suzuki under the Sherman Antitrust Act, 15 U.S.C. § 1, the Clayton Act, 15 U.S.C. § 14, and the Robinson-Patman Act, 15 U.S.C. § 13(a), (d) & (e). After discovery the trial court granted summary judgment for the defendant, which was affirmed on appeal. The Sixth Circuit stated:

Bold-Morr asserts two arguments to support its claim. First, it is charged that Suzuki initiated and maintained credit programs to enable dealers to purchase Suzuki products, and that Bold-Morr was not permitted to participate in these programs. Bold-Morr asserts that, as a result, its actual cost for motorcycles was greater than that of other Suzuki dealers who were approved for these credit programs. Two programs are cited by Bold-Morr in support of this contention: The "pay as sold" and the Suzuki finance programs.

Both the pay as sold program and the Suzuki finance program were initiated to afford credit to qualified dealers. Suzuki maintains that participation in its credit program is contingent upon a dealer's overall credit worthiness, and, therefore, credit decisions are based upon legitimate business factors. Suzuki presented evidence that its adverse credit decisions with respect to Bold-Morr were based on Bold-Morr's poor financial conditions.

Section 2(a) is not violated when credit decisions are based upon legitimate business reasons. *See, e. g., Craig v. Sun Oil Company of Pennsylvania,* 515 F.2d 221 224 (10th Cir. 1975), *cert. denied,* 429 U.S. 829, 97 S.Ct. 88, 50 L.Ed.2d 92 (1976). As noted by the Tenth Circuit, decisions involving the extension of credit do not, as a matter of law, constitute a Robinson-Patman violation, since "differences in the borrower's financial strength, business experience, and many other factors bring about differences in the terms of credit, security required, guarantees, and other devices used by creditors under [such] circumstances." *Craig, supra,* 515 F.2d at 224.

The record shows that Suzuki demonstrated the existence and application of business factors in mak-

> ing its credit decisions. To be eligible under the pay as sold program the dealer was required to meet the following requirements: satisfactory credit history with Suzuki; signing a continuing guaranty; signing a security agreement; obtaining sufficient insurance coverage; and providing a current financial statement. The record also reflects factors used by Suzuki in evaluating the dealer's credit worthiness, such as: the dealer's credit history, net worth, capital, cash position, personal guaranty and success of the dealership. Such financial factors also were used by Suzuki's credit department in determining whether a dealer was eligible for a line of credit under the Suzuki finance program.

Bouldis, 711 F.2d at 1325-26. The court then outlined facts that demonstrated a prudent credit decision by Suzuki based on legitimate business factors.

We do not find the holdings of *Catalano*, *Craig* and *Bouldis* sufficient to support a Robinson-Patman violation on the present facts. *Catalano* was a classic conspiracy case, and *Craig* also involved a claim of conspiracy. Here, there is no allegation of conspiracy. *Bouldis* approved summary judgment for the defendant after looking at the facts underlying the denial of credit. In this regard, it is worth emphasizing that courts have consistently recognized that extension of credit is quite customer specific, and certain facts activate alarms in credit departments and guide credit determinations. Perhaps for this reason, no court has found sufficient facts for Robinson-Patman liability based on a single credit decision involving one seller and one purchaser. *See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 547-48 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) (dismissing plaintiff's § 13(a) claim); *Cemar v. Nissan Motor Corp.*, 678 F. Supp. 1091, 1100-1101 (D. Del. 1988) (dismissing claim against defendants); *O'Connell v. Citrus Bowl, Inc.*, 99 F.R.D. 117 (E.D.N.Y.

1983) (although conceding possibility of § 13(a) liability, court denied motion to certify plaintiff class); *L. S. Amster & Co., Inc. v. McNeil Laboratories, Inc.*, 405 F. Supp. 617, 620-22 (S.D.N.Y. 1980) (granting summary judgment against plaintiffs on credit issue); *Petroleum for Contractors, Inc. v. Mobil Oil Corp.*, 493 F. Supp. 320, 326-28 (S.D.N.Y. 1980) (granting defendant's summary judgment motion); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 502 F. Supp. 637, 646-48 (D.N.J. 1980) (granting summary judgment in favor of defendant); *Robbins Flooring, Inc. v. Federal Floors, Inc.*, 445 F. Supp. 4, 9-10 (E.D.Pa. 1976) (although the court failed to grant defendant's 12(b)(6) motion as to the § 13(a) claim, it did not impose liability); *Glowaki v. Borden, Inc.*, 420 F. Supp. 348, 353-54 (N.D. Ill. 1976) (possibility of § 13(a) liability conceded, but court decided only not to grant defendant's motion for summary judgment); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F. Supp. 110, 122 (E.D.N.Y. 1976) (denying plaintiffs § 13(a) credit discrimination claim); *Lang's Bowlarama, Inc. v. AMF, Inc.*, 377 F. Supp. 405, 408-09 (D.R.I. 1974) (granting summary judgment in favor of defendants). The only question here, then, is that posed by those courts which have left open the possibility of Robinson-Patman liability in credit decision cases where there is an extreme situation "of such magnitude or nature as to constitute a violation." *Craig*, 515 F.2d at 224.

As a matter of law the present case does not present an extreme situation or one of any magnitude. Lorillard had prior payment problems with Kline when Kline owned Merrey in 1979. Kline makes light of this prior credit problem because it occurred in 1979, and because Merrey had been prompt in its payments since that time. However, Kline sold Merrey to Paolella in 1980 and thereafter Paolella made the payments. Kline had just bought Merrey back in December 1985, only weeks before the present credit problem arose. As a result, Lorillard's most recent experience with Kline had resulted in credit problems. Moreover, Kline's repurchase of Merrey occurred just before Paolella went into bankruptcy and caused a $700,000 loss to Lorillard. Also, Kline's new business was financed by MNIFC, the same lender which had foreclosed on Paolella. Kline's last minute pre-bankruptcy purchase of Merrey and the moving of sizable inventory from a Paolella warehouse in Philadelphia to his warehouse in Maryland caused Lorillard's credit antennae to twitch.

It is uncontradicted that plaintiff had little capital and was highly leveraged. There were no financial statements available except a pro forma which projected sales of $25 million per year with a $2.7 million profit. This is rather strange, and something that would catch the eye of a credit manager, particularly since Kline has insisted throughout these proceedings that he was greatly damaged by the temporary change in his credit arrangements because he operated on such a small profit margin. In 1979 Lorillard had put restrictions on credit terms with Merrey because of late payments, the deduction of discounts to which Merrey was not entitled, and disclaimers on its financial statement from Merrey's accountants. At the time of the January 31, 1986 $30,000 order, which plaintiff admits was a unusually large one, plaintiff still owed defendant $38,000 for past orders. Kline, although undercapitalized, was trying to expand as rapidly as possible by making large purchases on credit. The credit restriction at issue here, requiring cash payment, was promptly modified when a letter of credit supplied by MNIF was posted.

Moreover, plaintiff has not shown that it was treated differently or that a discriminatory standard of credit worthiness was applied to it. Kline tries to compare itself with Park Jensen but this comparison does not show unjustified credit discrimination toward Kline. Park Jensen furnished an $80,000 letter of credit to Lorillard, $20,000 larger than that required of Kline. Park Jensen had not been a subsidiary of Paolella, which caused Lorillard a very sizable loss when it went into bankruptcy. Tobacco inventory had not been moved from a Paolella warehouse to a Park Jensen warehouse at the time of the Paolella bankruptcy.

It is not the intent of Robinson-Patman to create a situation in which a jury is the final arbiter of the reasonableness of credit decisions. We are not concerned with the reasonableness of such decisions, but we are concerned with whether there was unjustified discrimination in extending or withholding credit to competing purchases. Credit decisions, by their very nature, require constant discrimination between those who are a good credit risk and those who are not. To avoid Robinson-Patman problems in the extension of credit, a manufacturer must use the same standard of credit worthiness in dealing with all applicants for credit who are in competition with one another.

In sum, the evidence presented by Kline, when considered without the testimony of its expert, which is dealt with in Section IV hereof, does not establish a Robinson-Patman violation.

IV.

Lorillard claims that the trial court committed error in admitting the testimony of Kline's witness, Lilly Ann Gordon, the plaintiff's sole expert witness on the issue of whether Lorillard's shift in credit practices was an unjustified credit discrimination and price discrimination under § 13(a) of the Robinson-Patman Act.

Although the spirit of the Rules of Evidence is to eschew excessive restrictions on the admissibility of testimony, the plain language of the Rules maintains some limitations on expressions of opinion. Lay opinions must be "rationally based on the perception of the witness," Fed. R. Evid. 701, and, only experts qualified by "knowledge, skill, experience, training, or education" may submit an opinion. Fed. R. Evid. 702.

Rule 702 provides the starting point for an evaluation of whether Gordon's testimony was properly admitted. The Rule provides that a person qualified may give opinion testimony if such testimony will aid the fact-finder "to understand the evidence or to determine a fact in issue." It is well established that "the trial court has broad discretion in determining whether to admit expert testimony and should not be reversed absent a clear abuse of discretion." *Friendship Heights Associates v. Vlastimil Koubek*, 784 F.2d 1154, 1159 (4th Cir. 1986). Generally, the test for exclusion is a strict one, and the purported expert must have neither satisfactory knowledge, skill, experience, training nor education on the issue for which the opinion is proffered. One knowledgeable about a particular subject need not be precisely informed about all details of the issues raised in order to offer an opinion. *Martin v. Fleissner GMBH*, 741 F.2d 61, 64 (4th Cir. 1984).

It is under these standards that Gordon's qualifications and her opinions are evaluated. Gordon was, by her own admission, not an economist. Her highest level of education was a master's degree in business administration, obtained about seven years prior to this trial. During her entire career Gordon had published only one article, a piece which had nothing to do with price discrimination, credit, or antitrust generally. Her work experience was limited largely to analyses of companies' financial health. Gordon stated that her present employer devoted most of its efforts to providing expert testimony in trials of complex business cases. Gordon admitted that she had no personal experience in making credit decisions.

In her testimony, she compared the plaintiff's pro forma statement with an audited statement of Park Jensen Company, Inc., a Kline competitor of similar size. She gave no weight to the fact that Lorillard required Park Jensen to furnish an $80,000 letter of credit, but stated that requiring a $60,000 letter of credit from plaintiff was inconsistent and was evidence of credit discrimination by Lorillard. She also admitted that she was unfamiliar with personal guarantees of stockholders or officers and how they would influence credit decisions.

She gave no weight to the fact that plaintiff had just been a subsidiary of Paolella, which had just gone into bankruptcy, with substantial loss to defendant. Nor was she impressed by the transfer of part of Paolella's tobacco inventory to plaintiff when Paolella went bankrupt, or by the fact that plaintiff had a very small capitalization and that there were no financial statements reflecting plaintiff's financial condition at the time defendant demanded cash.

Certainly no single one of these facts disqualifies Gordon from giving opinions about the legitimacy of the justifications for Lorillard's credit decisions. In combination, however, they lead us to the conclusion that this witness cannot satisfy even the minimal requirements of Fed. R. Evid. 702. There was no indication, for example, that Gordon's general business education included *any* training in the area of antitrust or credit. Similarly, Gordon admitted that she lacked *any* other experience in such matters. Although it would be incorrect to conclude that Gordon's occupation as a professional expert alone requires exclusion of her testimony, it would be absurd to conclude that no one can become an expert simply by accumulating experience in testifying.

Plaintiff's expert admitted that she had no experience in making credit decisions, and her testimony confirms that she totally lacked the "knowledge, skill, experience, training, or education" that Rule 702 requires of an expert witness. Although a trial judge has considerable discretion in the admission of evidence, and particularly expert testimony, the admission of Ms. Gordon's testimony on the issue of credit decisions was a clear abuse of discretion. The witness did not possess "scientific, technical, or other specialized knowledge" that would assist the trier of fact, as required by Rule 702. This evidence should have been excluded, it was not merely to be accorded the reduced weight normally allowed less qualified testimony.

Since the breach of contract claim is barred by the Maryland Statute of Frauds and the plaintiff did not establish a jury issue on its Robinson-Patman claim, we need not address the defendant's additional exceptions.

REVERSED.

SPROUSE, Circuit Judge, dissenting:

I respectfully dissent. I believe that Kline's contract claim is not barred by Maryland's Statute of Frauds. Kline testified that, based on his experience in the industry and his prior dealings with Lorillard, the reference to "direct basis" in the latter to Kline from Lorillard meant he could purchase all his requirements from Lorillard on open credit terms. The jury apparently accepted this evidence and answered "Yes" to the interrogatory: "Has the plaintiff proved that the parties entered into a contract whereby the defendant promised to supply the plaintiff with its reasonable requirements on open credit terms?"

Accepting, as we must, Kline's testimony, Maryland's prerequisites for a requirements contract have been met. This is demonstrated by a fuller quotation from *Cavalier Mobile Homes v. Liberty Homes*, 53 Md. App. 379, 395, 454 A.2d 367, 377 (1983) in which the Maryland Court of Special Appeals indicated that the statute of frauds is satisfied "where the quanity term is not numerically stated, . . . some writing . . . indicates that the quantity to be delivered under the contract is a party's requirements." The jury, with a proper instruction and with the benefit of Kline's testimony about the language in the letter, specifically found that the letter expressed Lorillard's agreement to meet Kline's requirements. I agree, therefore, with the district court that there simply is no reason to disturb that jury finding.

With regard to Kline's Robinson-Patman claim, I believe that the principles concerning credit restrictions are controlled by *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (per curiam), in which the United States Supreme Court stated:

> It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the

> purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price.

The general application of this proposition is illustrated by the Court's application of *Catalano* in the federal gift tax context in *Dickman v. Commissioner of Internal Revenue*, 465 U.S. 330, 337-38 (1984). This principle, when applied to the present case, requires that the credit restrictions imposed by Lorillard on Kline be viewed as equivalent to it charging a higher price.

Finally, I disagree with the majority's assessment of the district court's admission of Lilly Ann Gordon's expert testimony on behalf of Kline. The evaluation made by the majority was more properly made by the district court.

Because I believe that the jury's calculation of damages on both the contract and Robinson-Patman claims was insufficiently supported by the evidence, I would remand for a new trial on contract damages and Robinson-Patman damages.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. S 86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

MEMORANDUM AND ORDER

[Filed July 23, 1987]

On March 31, 1986 plaintiff, Thomas L. Kline, Inc. ("Merrey"),[1] filed a four count complaint against defendant, Lorillard, Inc. ("Lorillard"), in the Circuit Court for Cecil County, Maryland, alleging that Lorillard had breached its contract with Merrey, engaged in actionable price discrimination, interfered with Merrey's economic interests, and injured Merrey's business reputation.

On the same day, Merrey obtained an *ex parte* injunction restoring the pre-February 3, 1986 status quo. On April 2, 1986, Lorillard removed the action to this Court. Defendant moved for the dissolution of the *ex parte* injunction on April 10, 1986. A hearing was held, and on April 15, 1986, Judge Miller of this Court (now retired) issued a temporary restraining order requiring that Lorillard supply Merrey's needs on credit to the value of $120,000.00 per fifteen day period, repayment being partially secured by a letter of credit in the amount of

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[1] Plaintiff, Thomas J. Kline, Inc., does business as William B. Merrey & Sons. Plaintiff's president and sole shareholder is Thomas J. Kline, Jr. ("Kline"). For purposes of clarity and consistency, plaintiff will be referred to as "Merrey," and its owner will be referred to as "Kline."

$60,000.00. On May 1, 1986, Judge Miller granted Merrey's motion for a preliminary injunction, ordering sales under these credit and availability terms during the pendency of this litigation (Paper No. 20). The parties continue to operate under this injunction.

I. *Factual Background*

The background facts of this litigation will now be stated. Further facts will be stated as they relate to the discussions of the issues *sub judice*. Merrey is an Elkton (Maryland) based wholesale distributor of tobacco products, candy, and sundries to retail outlets in Delaware and parts of Maryland, Pennsylvania, and Virginia. Prior to 1980, Kline had owned and operated a tobacco wholesale company named William B. Merrey & Sons, Inc. In April, 1980, Kline sold that company's stock to M. Paolella & Sons, Inc., a much larger Philadelphia-based tobacco wholesaler, which operated its new acquisition as a division with Kline as the manager. In early 1985, Michael Paolella offered to resell the division to Kline. Negotiations culminated in a contract to sell dated November 23, 1985, and a closing on December 16, 1985, pursuant to which Kline purchased the accounts receivable, inventory, and certain equipment of the division in the name of Merrey. The newly formed company continued to service customers of the predecessor division.

Merrey primarily handles cigarettes. The pre-1980 Merrey company and the Paolella company had purchased cigarettes from the six leading cigarette manufacturers—Philip Morris, R. J. Reynolds, Liggett and Meyers, American Tobacco Company, Brown and Williamson, and Lorillard—on a "direct dealer" basis. The parties differ as to what a "direct dealer" is. The defendants contend that approval as a direct dealer merely means the ability to place with the manufacturer periodic orders for cigarettes to be shipped directly to the dealer for tax stamping and resale. This, defendants argue, is to be contrasted with a "sub-jobber," which is a wholesaler that does not have this relationship, and must purchase its products from a direct dealer (Paper No. 27 at 2). Kline contends that a direct dealer relationship, specifically as established by the terms "direct basis" and "direct list of customers for full line" as set forth in a letter from defendant to Merrey dated January 16, 1986 (Paper No. 27, Exh. 4), contemplates the right to obtain reasonable requirements from the supplier, indicating a requirements arrangement (Paper No. 28 at 10).

Kline contends that, prior to the closing on the repurchase agreement, he spoke by telephone to John Imperia, a supervisor for credit analysis in Lorillard's Credit Department. Kline contends that Imperia gave him oral assurances that there was no problem with Kline being approved as a direct dealer with normal credit terms. Defendant agrees that Imperia spoke to Kline, but denies that Imperia had the authority to, or in fact did, give Kline such assurances. On or about December 5, 1985, Lorillard internally approved Merrey as a direct dealer. On January 15, 1986, the letter that Kline contends establishes a requirements contract between the parties was sent to Merrey. That letter provides, in pertinent part, as follows:

> We are pleased to inform you that your request to purchase Lorillard products on a direct basis has been approved by our new accounts committee, and you have been added to our direct list of customers for Full Line as successor to W.B. Merrey & Sons, Inc.

(Paper No. 27, Exh. 5).

The credit terms extended were Lorillard's normal credit terms of a 3.25% discount from invoice price for payments received within 15 days of invoice, or 2% for payments mailed but not received within the 15 day period. Earlier, Kline had been notified that approval would be contingent on receipt of personal guaranties executed by Kline and his wife. Such guaranties were executed, with an addition by Kline limiting the guaranties to one year, and returned to Lorillard on January 17, 1987. Lorillard shipped to Merrey on the above credit terms from December 16, 1985 to January 31, 1986.

On January 14, 1986, Merrey signed an agreement of sale to purchase the assets of the Delab Company, a tobacco, candy and sundries wholesaler located in Smyrna, Delaware. Kline contends that he again talked to Imperia, and that Imperia assured him that the purchase would pose no problems with Lorillard. Imperia denies giving such assurances.

Both Paolella and Merrey were dependent upon lines of credit extended by Maryland National Industrial Financing Corporation ("MNIFC"). In Merrey's case, MNIFC agreed to advance, on the basis of daily reporting, credit equalling 85% of eligible accounts receivable outstanding, and 60% of inventory on hand, to a maximum line of $3,750,000.00. All advances were secured by interests in Merrey's assets, including inventory, so that when the cigarette manufacturers shipped to Merrey on open credit, the cigarettes immediately became subject to MNIFC's security interest.

On Thursday, January 30, 1986, allegedly without advance warning to the manufacturers, MNIFC repossessed Paolella's inventory, effectively putting Paolella out of business. Paolella owed large sums on open credit to the various cigarette manufacturers at the time. The next day, three of the manufacturers, but not including Lorillard, commenced involuntary bankruptcy proceedings against Paolella in Philadelphia. Primarily because of MNIFC's secured position in Paolella's inventory, Lorillard was forced to write off approximately $700,000.00 in its accounts receivable from Paolella.

This turn of events left Lorillard's director of credit, Vincent Miele, feeling uneasy about Merrey accounts receivable, because of the close ties over the years between Merrey and Paolella, and because of MNIFC's secured interest in Merrey. Miele first learned of the Paolella problems when he was telephoned by Ralph Mannheimer, director of credit at Philip Morris, who told Miele that he had a $500,000.00 check from Paolella on which payment had been stopped. Miele checked and found out that Paolella was $175,000.00 past due with Lorillard. Upon unsuccessfully attempting to reach Mike Paolella by telephone, Miele put a stop on Thursday's standing cigarette order and went to Philadelphat to visit the Paolella company. He visited the company with Mannheimer, whom he had met at the train station. At Paolella, he learned that MNIFC had taken control of the Paolella company.

After leaving Paolella, Miele called his office to make sure all Paolella orders had been canceled. He also asked several people to visit several of the wholesalers, to see how much Lorillard product those wholesalers were holding. The next morning Don Kueny, a Lorillard representative, visited Merrey and found out that Merrey had a very large inventory of Lorillard cigarettes. Miele then learned that Merrey had in an additional order for approximately $30,000.00 worth of cigarettes, which would almost double Merrey's outstanding debt to Lorillard, which was about $40,000.00 at the time of the new order. Miele declined to authorize this shipment on credit. The parties' accounts differ as to how Kline was informed of this decision.

Miele claims that he personally phoned Kline on the morning of Friday, January 31, 1986, and told Kline that no further orders would be taken on credit. Kline either would have to pay cash or get a letter of credit (Paper No. 27, Exh. 9 at 35-39). Kline says that the call came not from Miele, but from Kenneth Cherry, and that the call came either on Friday afternoon or on Monday, February 3, 1986. Kline says that Cherry told him that "he was not going to get burned by the same match twice" and that "we just went through a nasty ordeal in Philadelphia and I have reason to believe that there is something wrong in Elkton[,] and we have elected not to ship you unless you wire cash." (Paper No. 27, Exh. 11 at 64).

II. *Summary Judgment Standard*

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material fact and the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact. *Celotex Corporation v. Catrett*, 106 S. Ct. 2548, 2553 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has met this burden, the nonmoving party must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986); *Adickes*, 398 U.S. at 160 n.22.

In deciding the motion, the court must view the material facts, and the inferences properly drawn therefrom, in light most favorable to the nonmoving party. *Anderson*, 106 S. Ct. at 2513; *Adickes*, 398 U.S. at 158-59. Even where there is no dispute as to the basic facts, summary judgment is inappropriate if the parties disagree on the inferences that reasonably may be drawn from those facts. *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1979). The substantive law identifies which facts, or inferences therefrom, are material and also identifies the burdens of proof against which the presence or absence of material factual dispute is to be gauged. *Anderson*, 106 S. Ct. at 2510. Only facts that may affect the outcome of the case under governing law are "material." *Id.* Moreover, a factual dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

III. *Discussion*

A. *Breach of Contract*

Defendant's first argument is that the breach of contract claim must fail, because there is no writing sufficient to satisfy the statute of frauds. The parties agree that § 2-201 of the Uniform Commercial Code, *Md. Comm. Law Code Ann.* (U.C.C.) § 2-201 (1975), applies. What they disagree about is whether the quantity requirement of the statute is satisfied by the January 15, 1986 letter from Lorillard to Merrey. Plaintiff contends that the language "direct basis" and "our direct list of customers for full line" establish a requirements contract. Plaintiffs argue that the prior dealings of the parties as well as the trade practice compel such an interpretation. *See* U.C.C. § 1-205.

The parties agree that Maryland contract law applies to this case. The Court of Special Appeals of Maryland has addressed the issue of whether prior dealings of the parties and trade usage will be used to decide whether the terms of a memorandum are sufficient to satisfy the quantity requirement of the statute of frauds. In *Cavalier Mobile Homes, Inc. v. Liberty Homes, Inc.*, 53 Md. App. 379, 454 A.2d 367 (1983), that court considered the prior dealings between the parties in holding that the memorandum in question did not satisfy the quantity requirement of the statute. *Id.* at 395-96, 454 A.2d at 377. In so holding, the court wrote as follows:

> The invoices in evidence indicate a course of dealings between the parties. Our view of this distributorship is that each time Cavalier ordered a home from Liberty, a separate contract of sale was entered into by the parties. This series of contracts, evidenced by invoices, does not indicate that a require-

> ments contract existed, *i.e.*, that there was a contract to fill Cavalier's requirements. Each invoice solely reflects the terms and quantity of individual transactions. There is no indication that quantity is to be measured by requirements.

Id.

Likewise, the Court of Appeals of Maryland, in *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 369 A.2d 1017 (1977), found that the couse of dealing between the parties established that the ambiguous language in the written offer set forth that there was a requirements agreement sufficient to satisfy the quantity requirement of the contract. *Id.* at 544-45, 369 A.2d at 1027.[2] *See also* 72 Am. Jur. 2d, Statute of Frauds, § 320 n.72 and cases cited therein (1974).

Accordingly, this Court may consider course of dealings and trade usage in deciding, as a matter of law, whether the January 15, 1987 letter satisfies the quantity requirements of the statute of frauds. In support of its arguments, plaintiff offers the testimony of Kline that "the terms 'direct basis' and 'direct list of customers for full line' mean, by themselves, and unless modified by a credit limitation, that reasonable requirements for Lorillard products could be purchased from Lorillard on open credit terms." (Paper No. 28, Exh. A at 1-2). Kline also has stated that prior to his acquisition of-

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[2] The court refused to rule on the statute of frauds issue, because it had not been raised in the lower court. However, in remanding the case for further proceedings, the court cited, on the issue of the quantity term of the writing, several cases where course of dealing and trade practices were considered to determine whether an ambiguous quantity term satisfied the statute of frauds. 269 Md. at 548-49, 369 A.2d at 1029 (citing *Port City Construction Co. v. Henderson*, 48 Ala. App. 639, 266 So.2d 896 (1972) and *Hankins v. American Pacific Sales Corporation*, 7 Wash. App. 316, 499 P.2d 214 (1972)).

Merrey and Delab, Kline had always been able to purchase his full requirements from Lorillard (*id.*), and that before he decided to acquire Merrey he sought and received assurances from Lorillard that his prior arrangements with it would continue (*id.*, Exh. D at 35). Viewing these statements in a light most favorable to the plaintiff, as the Court must on a summary judgment motion, it cannot be said as a matter of law at this point that the prior dealings and trade usage cannot supply the quantity term sufficient to satisfy the statute of frauds. The Court will rule on this issue, as a matter of law, at the appropriate time after the commencement of the trial, when it has heard the witnesses *viva voce.*

Defendant next argues that, even if the defendant were contractually obligated to supply plaintiffs reasonable needs, defendant was not obligated to fill the order placed by plaintiff on January 31, 1986. Defendant argues that this order was disproportionately large, and considering all the circumstances then existing, including the Paolella bankrupty, defendant was justified in either not shipping the order at all or in seeking assurances of payments. Official Comment 2 to U.C.C. § 2-306 states, in pertinent part, as follows:

> [T]he party who will determine quantity is required to . . . conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his . . . requirements will approximate a reasonably forseeable figure. Reasonable elasticity in the requirements is expressly envisioned by this section and good faith variations-are permitted even when the variation may be such as to result in discontinuance. . . . The essential test is whether the party is acting in good faith. Similarly, a sudden expansion of the plant by which the requirements are measured would not be included within the scope of the contract as made but normal

> expansion undertaken in good faith would be within the scope of this section. . . .

Md. Comm. Law Code Ann. § 2-306, Official Comment 2 (1975).

The issue of good faith is a quintessential jury question. This is especially true in light of the dual subjective/objective nature of a merchant's duty of good faith in sales contract cases under U.C.C. § 2-103(1)(b). The plaintiff has submitted sufficient evidence to allow a reasonable jury to find that the plaintiff was not acting in bad faith and that the order was not disproportionate under § 2-306. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). Summary judgment, therefore, must be denied as to this issue.

With regard to the assurances issue, the parties dispute what exactly happened, specifically as to who told Kline about the problem and what that person told him. Kline's version of the story is that he talked to Cherry, not Miele, and that Cherry told him that only cash would be accepted (Paper No. 27, Exh. 11 at 63-64). Kline testified that the idea of a letter of credit only came up after he kept calling the Lorillard people, begging them to work something out (Paper No. 28, Exh. D. at 72-73). According to Kline, he and his attorney went to New York to speak to Cherry. When he asked to speak to Cherry, Cherry told him he had five minutes, then interrupted Kline's explanation and practically threw Kline and his attorney out of the office (*id.* at 71-72). This certainly casts a shadow on Lorillard's claims that Lorillard actually sought assurances and that Kline was given a reasonable chance to explain. Viewing the evidence in a light most favorable to the plaintiff, then, there is sufficient evidence to allow a reasonable jury to find in its favor on this issue as well.

In short, summary judgment is inappropriate on the breach of contract count, because there are several material disputes that have to be resolved at trial—one by the Court and the others by the jury.

B. *Price Discrimination*

2. *Elimination of Credit as Price Discrimination*

Elimination of short-term trade credit to a purchaser, requiring the purchaser to pay in cash, either before or after delivery, absent legitimate business reasons, is tantamount to elimination of discounts, and may be actionable under the Robinson-Patman Act. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); *see also Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1325-27 (6th Cir. 1983). Distinctions in extensions of credit based on demonstrably legitimate business considerations do not amount to price discrimination. *Bouldis*, 711 F.2d at 1325; *Craig v. Sun Oil Company of Pennsylvania*, 515 F.2d 221, 224 (10th Cir 1975), *cert. denied*, 429 U.S. 829 (1976); *Petroleum for Contractors, Inc. v. Mobile Oil Corp.*, 493 F. Supp. 320, 327 (S.D.N.Y. 1980). Some of the legitimate business considerations upon which distinctions in extensions of credit may be based are as follows: differences in the borrower's financial strength; business experience; credit history; net worth; capital; cash position; personal guaranty; and success of the borrower's business. *Bouldis*, 711 F.2d at 1327.

The plaintiff has submitted evidence that Cherry testified that the number of customers in the same relevant market area as the plaintiff required by Lorillard to pay cash in advance or to obtain letters of credit is very small (Paper No. 28, Exh. I at 173-75). Dr. Peter Linneman, defendant's expert, testified that the number of customers required to pay cash or get letters of credit was about one to one and one-half per cent (*id.*, Exh. G at 119). Lorillard has stipulated that the majority of its customers are granted open, unsecured fifteen day credit terms (Pretrial Order at 26). Plaintiff has submitted testimony of an economic expert, Lilli Gordon, who examined the files of Merrey's competitors, to the effect that to put Merrey in this small, disfavored group is not justified by valid business considerations (*id.*, Exh. F. at 16-23). Kline contends, and Lorillard does not dispute, that Merrey had a long, unblemished payment record (*id.*, Exh. D at 35, 40 & 43; Exh. I at 26-27 & 194-96). Considering the evidence in a light more favorable to the plaintiff, there is sufficient evidence to allow a reasonable jury to find that the credit restriction was for no legitimate business reason. Summary judgment is inappropriate on this issue.

2. *Competitive Injury and Damages*

The defendants argue that plaintiffs fail to allege and prove anything more than a *de minimis* competitive injury. Defendant's argument under that heading also addresses the damages issue. In fact, defendant seems to argue that, because (in its view) plaintiff has stated no damages, then plaintiff has stated no competitive injury. The two issues are separate and distinct concepts.

One of the elements a plaintiff must prove to establish a prima facie violation of § 2(a) is "a reasonable possibility that a price difference may harm competition." *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983). This does not require that the plaintiff prove actual harm to competition. *Id.* "Unless rebutted by one of the Robinson-Patman Act's affirmative defenses, a showing of competitive injury as part of a prima facie case is sufficient to support injunctive relief, and to authorize further inquiry by the courts into whether the plaintiff is entitled to treble damages under § 4 of the Clayton Act, . . ." *Id.* Thus, a plaintiff may establish competitive injury sufficient to warrant issuance of an injunction, as the plaintiff requests in this case, but may fail to prove damages sufficient to warrant treble damages. Competitive injury is, however, the threshold issue.

Competitive injury may be proved by, *inter alia*, direct evidence of diverted sales. *Id.* at 435, 537. Plaintiff argues that the strict credit restrictions placed upon it caused it to be unable to "fill the void" opened by the Paolella collapse. Given the unique business situation at the time of the credit restrictions and the very low profit margin in the cigarette business, plaintiff's evidence is sufficient to withstand a motion for summary judgment. Because of plaintiff's close ties to Paolella, a jury could reasonably conclude that plaintiff was in a very good position to pick up some or all of the Paolella business, and that the plaintiff actually lost sales as a result of the actions of the defendant.

An inference of competitive injury may be established by "proof of a substantial price discrimination between competing purchasers over time." *Id.* at 435. Defendant argues that the claimed credit discrimination here resulted in less than a one per cent difference and, therefore, it was not substantial. This argument ignores plaintiff's contention that other customers were given unlimited open credit, while the plaintiff's credit was limited to the amount for which plaintiff got a letter of credit. Thus, the discrimination, taking the facts in a light most favorable to the plaintiff, was substantial. Plaintiffs have submitted evidence upon which a reasonable jury may find that the plaintiff lost sales and/or there was substantial price discrimination over time.

Once competitive injury is proved, in order to recover treble damages under § 4 of the Clayton Act, plaintiff must make "some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).[3] As discussed *ante*, the plaintiff has presented evidence from which a jury may reasonably find a loss of sales opportunity. Summary judgment, therefore, will be denied on the antitrust claims.

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[3] The *J. Truett Payne* case addresses damages, not competitive injury as a part of the plaintiff's prima facie case. *Falls City* addresses how the prima facie case is made. *See Falls City*, 460 U.S. at 435 n.6

C. *Tortious Interference with Business Relations*

The parties agree that the elements of the tort of intentional interference with business relations are as follows:

1. Intentional and willful acts;

2. Calculated to cause damage to the plaintiffs in their lawful business;

3. Done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and

4. Actual damage and loss resulting.

Fitzgerald v. *Penthouse International, Ltd.*, 525 F. Supp. 585, 603 (D. Bd. 1981), *rev'd in part on other grounds*, 691 F.2d 666 (1982) (reversing the District Court's conclusion of no genuine dispute of material fact as to actual malice); *McLaughlin v. Copeland*, 435 F. Supp. 513, 525 (D. Md. 1977); *Beane v. McMullen*, 265 Md. 585, 604, 291 A.2d 37, 47 (1972).

Defendant moves for summary judgment on the grounds that it was privileged, by virtue of common interest, to make communications concerning Kline and Merrey to the other cigarette manufacturers, and that the statements were true. The parties disagree as to who bears the burden of proving privilege. This dispute arises out of the use of the label "privilege" to refer to the defendant's argument that the interference, if any, was done with a proper purpose. Plaintiff argues that the burden of proving that the defendant was privileged lies with the defandant. Plaintiff cites *Alyeska Pipeline Service Co. v. Aurora Air Service, Inc.*, 604 P.2d 1090 (Alaska 1979), in support of this proposition. In Alaska, however, lack of justification is not a part of the plaintiff's prima facie case, as it is in Maryland. In states where lack of justification is a part of the plaintiff's case, courts have held that the burden is on the plaintiff to prove lack of privilege. *See, e.g., Francis Chevrolet Co. v. General Motors Corp.*, 602 F.2d 227, 230 n.3 (8th Cir. 1979) (applying Missouri law); *Swager v. Couri*, 77 Ill. 2d 173, 395 N.E.2d 921, 926 (1979). In Maryland, the plaintiff must prove lack of justification. There is no "privilege" here, *per se*, because a privilege is something that a defendant may rely on after the plaintiff has proved his case. Thus, in a defamation case, where lack of justification is not an element of the plaintiff's case, the defendant may prove a privilege, which is a defense to the action. Moreover, the fact that a party acts "maliciously," in the sense that he has an ill motive, does not make him liable, if he has a right to act; but if he had no right to act—no justification—he may be liable. *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 567, 69 A. 405, 409 (1908). Finally, because falsity is not an element of the plaintiff's case, truth is not an absolute defense to the tort, although it may surely be relevant to determine whether the conduct was justified.

There is evidence in the record that Lorillard, through Miele, made communications to at least one of the credit officers of one of the other manufacturers, Mr. Mannheimer, that a Lorillard sales representative had seen one of Merrey's trucks loading Lorillard cigarettes at a company called Ronnie's Tobacco (Paper No. 28, Exh. R at 40-41). At his deposition, Miele testified that he had told Mannheimer, while in the company of Bob Manfreda, of Brown and Williamson Tobacco Company, and Joe Dolen, of U.S. Tobacco Company, that Lorillard had withdrawn credit on Merrey and that a report had been issued showing the terms given to Merrey as cash in advance (Miele Depositition at 69-73, 90-93). Mr. Miele was very sketchy, and at times evasive, in his deposition responses.

Considering this evidence and the inferences properly drawn therefrom in a light most favorable to the plaintiff, it appeals that the entire story might not have emerged at deposition. In short, whether the defendant's actions were justified or not will have to wait for determination at trial. This issue is very close, and the Court is giving the plaintiff every benefit of the doubt on this count. As elsewhere in this opinion, the Court is not here ruling that there is, as a matter of law, sufficient evidence to preclude a directed verdict at the close of the plaintiff's case. The Court is simply giving the plaintiff the benefit of the doubt, considering the subjective nature of the tort alleged and considering the tenor of Mr. Miele's deposition testimony.

D. *Injurious Falsehood*

The evidence in support of this claim is equally as tenuous as that in support of the last one. However, for the reasons stated above, it is impossible to determine without live testimony whether, as the plaintiffs argue, Lorillard's communications were "intended to create the misimpression that Merrey lacked good business ethics and judgment." Summary judgment, therefore, will be denied on this claim as well.

Accordingly, IT IS, this 23rd day of July, 1987, by the United States District Court for the District of Maryland, ORDERED:

1) That the defendant's motion for summary judgment BE, and the same hereby IS, DENIED; and

2) That the Clerk of Court mail copies of this Memorandum and Order to counsel for the parties.

/s/ Frederic N. Smalkin
FREDERIC N. SMALKIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S 86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

MEMORANDUM, ORDER, AND CERTIFICATION UNDER FED. R. CIV. P. 54(b)

[Filed October 6, 1987]

On September 23, 1987, the jury in this case returned a verdict for the plaintiff and against the defendant in the amounts of $1,000,000 on the contract claim and $526,733 on the antitrust claims. The parties dispute the amount that should be entered as judgment. The defendants first argue that the damage awards are inconsistent, requiring a new trial on the issue of damages. Defendant cites two cases on this point, *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096 (5th Cir. (1971); and *Wickham Contracting Co. v. Board of Education*, 715 F.2d 21 (2d Cir. 1983).

In *Weingart*, the Fifth Circuit upheld the trial court's grant of a new trial where the damage awards for compensatory damages for breach of contract and fraud were hopelessly inconsistent with the evidence. *Id.* at 1106. In that case, as here the plaintiff had claimed the same damages for both of the claims. There, however, the jury charges and the interrogatories were identical, yet the jury awarded $28,000 for breach of contract and over

$200,000 for fraud. In this case, the jury charges were not identical. The antitrust instructions centered only around lost profits, considering the profits before the violation as compared to the profits after the violation (*see* Court's Instruction No. 38), whereas the contract damages instruction contemplated lost profits plus "any loss resulting from the general or particular requirements and needs of which the defendant had reason to know at the time of contracting and which the plaintiff could not reasonably prevent." (Court's Instruction No. 28).

In *Wickham*, the district court had erred by adding the two awards together after trebling the antitrust award. 715 F.2d at 28. Also, there the Section 303 damage award was for the amount of $959,000, an amount greatly in excess of any damages for which the Second Circuit could find support in the record.

In this case, the plaintiff's expert accountant calculated a damage estimate at approximately $1,500,000. The contract and antitrust awards are each well within the expert's estimate. Any inconsistency in the awards would seem to be in the defendant's favor. (Additionally, the defendant did not object to the awards as inconsistent at a time when additional inquiries could have been made. The Court utilized the mechanism of Fed. R. Civ. P. 49(b), and inconsistencies could have been resolved by resubmission.) In any event, the Court will not now withhold entry of judgment on the verdict on the basis of alleged inconsistency.

Turning to the issue of the amount of the judgment to be entered, both parties agree that the plaintiff should not be doubly compensated for the same element of compensatory damage. The plaintiff argues that the higher amount of $1,000,000 should be entered as compensatory damages, and that in addition, twice the antitrust award should be entered as an award in the nature of punitive damages. The Court agrees. The trebled antitrust damages provided for in the statutes provide for both compensatory and punitive damages. *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1283 (8th Cir. 1981); *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 76 485 A.2d 663, 678 (1984). The compensatory portion of the antitrust award is the amount of damages found by the jury to have resulted from the antitrust activity. The award is then trebled. Of the result, two-thirds is punitive in nature. Therefore, an award of compensatory damages on both counts and punitive damages with treble antitrust damages would be duplicative. *Superturf, Inc.* 660 F.2d at 1284. However, this Court sees nothing wrong with awarding the plaintiff the higher of the two awards of compensatory damages, along with the punitive damages part of the antitrust award. Therefore, a judgment of $2,053,466.00, respresenting $1,000,000 plus $1,053,466.00 ($526,733.00 x 2), will be entered by separate order.

The defendant claims that no money judgment should be entered now because the Court has not yet entered an injunction pursuant to 15 U.S.C. § 26, which was requested as antitrust relief. Thus, defendant argues, there are still unadjudicated claims for relief that preclude the entry of a Rule 58 judgment, pursuant to the terms of Rule 54. This may be true, and the Court will deal with those issues, if any, at an appropriate time, based on the record of the jury trial, supplemented if and as necessary. *See Florists' Nationwide Tel. Del. Net. v. Florists' Tel. Del. Ass'n*, 371 F.2d 263, 271 (7th Cir. 1967). The Court is not convinced that the demand for injunctive relief is itself a "claim for relief" in the Rule 54 sense, because it does not arise from a separate set of facts, but, out of an abundance of caution, it has decided to enter a money judgment under the provision of Rule 54(b). The Court now makes an express determination that there is no just reason for delay, because there are no issues connected with injunctive relief that ought to delay plaintiff's ability to have the jury's verdict reduced to judgment, and it expressly directs the entry of final judgment in the amount of $2,053,466.00 for the plaintiff and against the defendant on the claims for monetary damages, with interest and costs.

Dated: October 6, 1987.

/s/ Frederic N. Smalkin
FREDERIC N. SMALKIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S 86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

JUDGMENT ORDER

In accordance with the foregoing Memorandum, IT IS, this 6th day of October, 1987, by the United States District Court for the District of Maryland, ORDERED:

1. That, for the reasons stated in the foregoing Memorandum, the Court expressly determines that there is no just reason for delay in entering final judgment pursuant to Fed. R. Civ. P. 54(b) on the jury's verdict on plaintiff's claims for monetary damages for breach of contract and antitrust violations, in the amount of $2,053,466.00;

2. That the Court expressly directs pursuant to Fed. R. Civ. P. 54(b) that final judgment BE, and the same hereby IS, ENTERED on the plaintiff's claims for monetary damages, in favor of the plaintiff and against the defendant, in the amount of $2,053,466.00, together with interest and costs; and

3. That the Clerk of Court mail a copy of this Order and of the following Memorandum to counsel for the parties.

/s/ Frederic N. Smalkin
FREDERIC N. SMALKIN
United States District Judge

[Filed Oct. 6, 1987]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. S 86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

MEMORANDUM AND ORDER

[Filed Nov. 16, 1987]

After a lengthy trial, the jury in this case awarded the plaintiff a favorable verdict on plaintiff's claims of breach of contract and violation of the Robinson-Patman Act, fixing damages for the former claim in the amount of $1,000,000, and, for the latter claim, in the amount of $526,733. In accordance with the reasons stated in a Memorandum, Order, and Certification under Fed. R. Civ. P. 54(b) entered October 6, 1987, the Court entered judgment in the amount of $2,053,466 in favor of the plaintiff, against the defendant, with costs and attorney's fees.* The defendant has now moved alternatively for judgment n.o.v., Fed. R. Civ. P. 54(b), for a new trial, Fed. R. Civ. P. 59(a), or for the conditional grant of a new trial with remittitur.

Having consiered the defendant's motion and the parties' briefs on the issue raised, the Court is of the opinion that no post-trial relief is warranted.

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* The Court has the plaintiff's motion fixing the amount of the fees *sub curia* at present.

Turning first to the contract claim, the Court finds that there was adequate evidence to support the jury's finding that the parties entered into a requirements contract sufficient under the Uniform Commercial Code (U.C.C.) statute of frauds § 2-201. The jury was specifically asked an interrogatory on this point, and the testimony of Mr. Kline, which it believed, was adequate evidence of the quantity term, *viz.*, a requirements contract. The fact that, after the contract was entered into, Kline might have made occasional purchases of Lorillard products from sources other than the manufacturer is utterly irrelevant to the question of the sufficiency of the writing to satisfy the statute of frauds at the inception of the contractual relationship; Lorillard has not countersued Kline for breach of contract on account of these purchases.

With further regard to the breach of contract claim, the Court finds that its refusal to charge on the assurance-of-performance section of the U.C.C., § 2-609, was entirely justified, for several reasons. First, this Court will not ignore the plain mandate of the statutory language, which requires a § 2-609 demand to be in writing.

Defendant cites cases in which some courts have held that the request for assurances need not be in writing. *See, AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167 (7th Cir. 1976); *see also Copylease Corporation of America v. Memorex Corp.*, 403 F. Supp. 625 (S.D.N.Y. 1975); *Kunian v. Development Corporation of America*, 165 Conn. 300, 334 A.2d 427 (1973). The reasoning behind this line of cases, as explained in *AMF*, is that the general rule of construction for the U.C.C., as expressed in § 1-102(1),—that the provisions of the Code are to be liberally construed and applied to promote the underlying purposes and policies of the Code—requires rejection of "such a formalistic approach" to § 2-609 *AMF*, 536 F.2d at 1170-71. This Court does not agree with that interpretation. The language of § 2-609, requiring that the request be made in writing, is clear and unambiguous on its face and, therefore, requires no construction, liberal or strict. In interpreting the U.C.C., a court must follow the same principles of statutory construction as it would in interpreting any other legislative enactment. *Jefferson v. Jones*, 286 Md. 544, 548, 408 A.2d 1036, 1039 (1979) (citing *Fairchild v. Maritime Air Service*, 274 Md. 181, 185-86, 333 A.2d 313, 315-16 (1975)). Construction is necessary only where the language of the statute is not clear. *Schauder v. Brager*, 303 Md. 140, 145-46, 492 A.2d 630, 633 (1985); *Jefferson*, 286 Md. at 548, 408 A.2d at 1039; *Travelers Insurance Co. v. Benton*, 278 Md. 542, 545, 365 A.2d 1000, 1003 (1976). Even the official comments to a particular U.C.C. section may not be used to vary the plain language of the statute. *Jefferson*, 286 Md. at 548, 408 A.2d at 1039; *Frericks v. General Motors Corp.*, 278 Md. 304, 312, 363 A.2d 460, 464 (1976).

The Court, therefore, will not follow the line of cases cited by defendants. It will follow the line of cases interpreting § 2-609 to mean what it says in clear and unambiguous language, that a demand for assurances must be in writing. *See Continental Grain Co. v. McFarland*, 29 U.C.C. Rep. Serv. 512, 513 (4th Cir. 1980) (upholding the district court's exclusion of evidence pertaining to insecurity where no written demand given) (unreported in Federal Reporter); *Bodine Sewer, Inc. v. Eastern Illinois Precast, Inc.*, 143 Ill. App. 3d 920, 943 N.E.2d, 705, 712 (1986); *Automated Energy Systems, Inc. v. Fibers & Fabrics of Georgia, Inc.*, 164 Ga. App. 772, 298 S.E.2d 328, 329-30 (1982); *Teeman v. Turek*, 312 Minn. 292, 251 N.W.2d 698, 701 (1977).

Second, the Court accepts the jury's finding, which was supported by adequate evidence, that Lorillard did not act in a commercially reasonable manner in connection with Kline's credit cut-off, thereby making any demand for assurances commercially unreasonable. Third, the testimony at trial showed that the cut-off decision had already been made when Kine was informed of it, thus putting Lorillard's conduct beyond the reach of § 2-609, which is intended to force the hand of a contracting party whose conduct, though hinting at an anticipatory repudiation, cannot safely be relied upon by the aggrieved party to establish the same. In such circumstances, § 2-609 gives the aggrieved party the means to force the equivocator's hand. The facts in this case showed absolutely no such scenario, and no issue warranting an instruction under § 2-609 was tried. The Court also holds that the question of the reasonableness of Lorillard's conduct under the contract presented a jury question, rather than an issue that ought to have been ruled upon as a matter of law. This point is so evident as not to need citation of authority. In short, there is no merit in Lorillard's contentions regarding the contract claim.

Turning to the Robinson-Patman Act claim, although it is true that many cases have recognized a business' right to exercise reasonable business judgment in setting differential rates of credit for its retail customers, *see, e.g., Secatore's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp 665 (D. Mass. 1959), there is certainly authority for the proposition that elimination of credit can be the same as a price increase, whether viewed as direct or indirect from a price discrimination. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). Under these circumstances, there is a jury question presented, and the jury here was furnished with all of the facts needed to resolve the question of whether there was price discrimination, or simply a reasonable exercise of business judgment in setting credit. The jury's resolution of the issue was supported by sufficient evidence to withstand a post-trial motion. The Court also finds that there was an adequate factual basis for the jury's verdict in terms of competitive injury and antitrust injury, given the peculiar situation of the cigarette market in the Philadelphia area at the time Lorillard cutoff Kline's credit, taken together with Kline's expansion plans that arose directly out of that market situation. The jury obviously believed, based on adequate evidence, that these plans had to be scrapped (to Kline's competitive disadvantage) as a result of Lorillard's conduct. *See Hasbrouck v. Texaco, Inc.*, —— F.2d, ——, 53 Antitrust & Trade, Reg. Rep. (BNA) 730, 732-33 (9th Cir. Oct. 26, 1987).

With regard to the defense of meeting competition, the Court finds that there was no evidence to justify charging the jury on that defense, given the fact that Lorillard monopolized the supply of Lorillard's cigarettes, for all practical purposes, to distributors such as Kline, and given the uncontradicted evidence that all distributors must offer a full range of cigarettes, including Lorillard products, in order to stay in business. Furthermore, there was no evidence that could be believed by a reasonable fact-finder tending to show that Lorillard's conduct was undertaken for the purpose of meeting competition with regard to Lorillard products. True, the evidence showed a remarkable harmony of action on credit terms by cigarette manufacturers generally, but this evidence must be viewed in light of the fact that the various manufacturers' products simply do not compete with each other on price terms at the wholesale level. Although there may be competition among tobacco companies at the retail level, the state price-fixing laws testified to at trial make it plain that the competition at the retail level is on the basis of brand appeal and loyalty, rather than on the basis of price. There was no credible evidence that it was necessary for Lorillard to favor other distributors in order to meet competition from other manufacturers. For these reasons, as well as those stated on the record in open court during trial, there is no merit in the "meeting competition" defense.

Finally, with regard to the question of damages, the Court finds that there was competent expert testimony establishing damages, and that the jury's awards, both as to the contract and the antitrust claims, were well within the range of the damage evidence produced at trial. The jury could certainly reasonably have found, with adequate evidentiary support, that the conduct of Lorillard led to lost sale opportunities of a great magnitude, given the unique chance that Kline had to gain ground in the Philadelphia market when the transactions in question took place, an opportunity that Kline irretrievably lost. This was exemplified by the fact that he had to let experienced extra salesmen go shortly after Lorillard cut off his credit. It was uncontradicted at trial that, in Kline's business, sales volume is entirely dependent on the skill and contacts of the salesmen, who bring their books of business with them when they come to work for a distributor. Without these experienced salesmen, Kline lost a very profitable window of opportunity, a loss that could reasonably account for lost profits in the range testified to by Kline's expert. Finally, the Court must keep in mind the lenient damage rule in antitrust cases as recognized in, *e.g.*, *Metrix Warehouse, Inc. v. Daimler Benz*, 828 F.2d 1033, 1045-47 (4th Cir. 1987). *See also Hasbrouck*, —— F.2d at ——, 53 Antitrust & Trade Reg. Rep. (BNA) at 733-34.

Because there is no legal impediment to the verdicts and judgment standing as recorded, defendant's motion for judgment n.o.v. is hereby *denied*. Because the jury's verdicts were adequately supported by the evidence and did not result in any miscarriage of justice, the defendant's motion for new trial is also *denied*.

SO ORDERED, this 16th day of November, 1987.

/s/ Frederic N. Smalkin
FREDERIC N. SMALKIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. S-86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

In accordance with the Memorandum and Order dated November 16, 1987, filed in the above entitled case, it is

ORDERED

1. Defendant's motion for judgment n.o.v. is hereby "DENIED".
2. Defendant's motion for new trial is "DENIED".

Dated at Baltimore, Maryland this 16 day of November 16, 1987.

JOSEPH A. HAAS
Clerk
by

/s/ Shirley L. Franke
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. S-86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

MEMORANDUM

[Filed Nov. 24, 1987]

Pending in this case is plaintiff's motion for attorney's fees (Paper No. 48). Defendant has responded (Paper No. 50). Plaintiff has replied (Paper No. 53). No hearing is necessary to decide this motion. Local Rule 6, D. Md.

Pursuant to 15 U.S.C. § 15, and Md. Com. Law Code Ann. § 11-209(b)(4), plaintiff has moved for attorney's fees of $374,307.50, based on a "lodestar" figure of $267,362.50 with a multiplier of 40 per cent.[1] Defendant does not challenge plaintiff's counsel's hourly rates, but it does challenge the number of hours claimed and the extent to which the claimed hours relate to the antitrust issues in this case.

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[1] Plaintiff also has attached to its motion and memorandum a list of several costs allegedly incurred during this litigation. Plaintiff's motion, however, does not request that these costs be awarded as fees. Indeed, the proper avenue for recovery of expenses is through the taxation of costs, not a motion for attorney's fees. *See* 28 U.S.C. § 1920; Fed. R. Civ. P. 54(d). The Court, therefore will not consider these costs in computing the fee to be awarded.

I. *The Legal Standard for Determining Fees*

In this Circuit, twelve factors are to be considered by the Court in calculating the amount of attorney's fees to be awarded a prevailing party:

> These include: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the istant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorenys' fees awards in similar cases.

Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 n.28 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978), applied in *Dameron v. Sinai Hospital of Baltimore, Inc.*, 644 F. Supp. 551, 553-54 (D. Md. 1986), *rev'd in part on other grounds*, 815 F.2d 975 (4th Cir. 1987).

A mere recitation of the twelve factors is insufficient. The district court is to set out specific findings of fact with regard to the *Barber* factors, unless the plaintiff's fee petition is so unreasonable as to shock the conscience of the court. *Sun Publishing Company v. Mecklenberg News, Inc.*, 823 F.2d 818, 820 (4th Cir. 1987); *Anderson v. Morris*, 658 F.2d 246, 248-49 (4th Cir. 1981); *Dameron*, 644 F. Supp. at 554. The first step in this procedure is to multiply the customary hourly rate for similar services by the amount of hours found to be reasonably expended on the claims for which fees are allowed. *Anderson*, 658 F.2d at 249; *Dameron*, 644 F.

Supp. at 554. The product of these two factors is the "lodestar" figure. The lodestar may be adjusted up or down in consideration of the remaining *Barber* factors. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *Dameron*, 644 F. Supp. at 554.

.II. *Discussion*

A. *The Lodestar*

Defendant does not question the fee rates listed for the various people who worked on this case. Defendant does challenge the reasonableness of the number of hours spent on certain work. Defendant also challenges whether the work cited relates to the antitrust issues of this case. The Court first will address the separability of the different claims in this case.

Both parties cite *Hensley v. Eckerhart* for the analysis of whether the work done relates to the antitrust issues. Although *Hensley* dealt with the issue of separating hours spent working on successful claims from those spent on unsuccessful claims, its "common core of facts" analysis is applicable to allocate the hours spent working on several successful claims, for only one of which are recoverable. The *Hensley* Court wrote as follows:

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved."
>
> * * * *
>
> In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will

> be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Hensley, 461 U.S. at 434-35.

The case *sub judice* involved three sets of claims: the contract claims, the antitrust claims, and the tort claims. Plaintiff may recover attorney's fees only for the antitrust claims. The issue, therefore, is whether the contract and tort claims are separate and distinct claims, as compared to the antitrust claims, or whether they arose out of a common core of facts or related legal theories so as to make separation of hours worked on each claim impossible.

The contract and antitrust claims in this case are so closely related that it would be impossible to separate the time spent on each claim. Both claims turned on the same factual situation—the withholding and/or restriction of plaintiff's credit by defendant. The legal issues involved are not exactly the same, but the Court will accept plaintiff's counsel's proffer that it has separated approximately 300 hours of legal work that was involved solely in the preparation of legal arguments relating to the contract claims.

The tort claims (which were the subject of directed verdicts) are not as closely related as the contract claims, but this Court does not believe that they are so distinguishable as to allow separation of the time spent on those claims. Defendant cites several depositions of employees of the other cigarette manufacturers and argues that these depositions must have been done only in conjunction with the tort claims. While it is true that it seems that one of the main points of these depositions was to discover facts relating to the tort claims, it also seems that the depositions of most, if not all, of these people would had to have been taken to discover information relating to the price-fixing claims. The deposition time, therefore, is not excludable from plaintiff's counsel's time.

Defendant also argues that the time spent procuring the preliminary injunction should be excluded, because the injunction was predicated upon breach of contract allegations, not antitrust. This is factually incorrect. The price-fixing claim has been a part of this action from its inception (*see* Paper No. 4, Count II), and the Affidavit of Thomas J. Kline in Support of Plaintiff's Motion for Extension of Temporary Restraining Order alleges that "at a time when plaintiff is not even allowed standard credit, . . . Defendant has begun offering unusually favored terms to Defendant's [sic] competitors." (Affidavit at ¶ 9). Defendant argues that Stephen Cromwell had nothing to do with the antitrust issues. Mr. Cromwell's testimony, however, was relevant to the factual circumstances surrounding the defendant's actions and to the damage aspect of the case. For example, Cromwell testified at trial that Kline was out of formula; that is, he already had more loans outstanding than his formula would permit (*see* September 16, 1987 trial transcripe at 25). This supports the theory, which the jury obviously accepted, that the withdrawal of credit to Kline caused him to lose the Paolella business opportunity. Defendant also argues that time spent reviewing the bankruptcy files of M. Paolella and time spent securing and reviewing deposition transcript of Paolella are unrelated to the antitrust issues. The Paolella bankruptcy and the activities of Mr. Paolella were relevant to the factual development of this case, generally, and were particularly relevant to the issue of whether the defendant's decision to withhold credit was based on reasonable business factors, an antitrust defense. In short, this is one of those cases where much of counsel's time was spent on developing the case as a whole, and the time is inseparable on a claim-by-claim basis.

The Court, therefore, will not attempt to separate the hours submitted by plaintiff's counsel on a claim-by-claim basis. In determining whether to supplement or decrease the lodestar figure, however, the Court will consider that not all the claims asserted were antitrust claims, and that the plaintiff did not prevail on the tort claims.

The next issue is the reasonableness of the time spent. As the Supreme Court wrote in *Hensley*, "[t]he district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.' . . . Cases may be overstaffed, and the skill and experience of lawyers vary widely. 461 U.S. at 434. Defendant claims that plaintiff has not attempted to weed out duplicative or excessive time, and, therefore, plaintiff has not exercised "billing judgment," as is required by *Hensley*. Defendant cites several examples of situations for which it claims hours are duplicative or unnecessary. Defendant argues that the presence of Mr. Price, Mr. Kowalsky, and Ms. Lindeman at the depositions in New York on June 12, 1986 was duplicative. The Court does not believe so. Mr. Kowalsky was the plaintiff's corporate attorney, and a fact witness in the case. It is entirely reasonable for him to have attended the depositions. It is also reasonable for the trial team of Price and Lindeman to attend the depositions, as they both would be trying the case. The Court also does not believe that Mr. Kowalsky's attendance at trial on September 14, 1981 was excessive. Defendant's house counsel from New York attended the entire trial, though not an active participant at trial. Neither does the Court believe that the law clerk time of Aaron Raskas, spent travelling to Philadelphia to review the Paolella bankrupty file, was excessive. In fact, the Court believes that it was prudent of counsel to use a law clerk for such research instead of an attorney. Finally, the Court does not believe that the paralegal and law clerk time spent organizing documents and potential exhibits and abstracting depositions was excessive, given the complexity of this case, which took almost two trial weeks to try.

Accordingly, the lodestar will be computed by multiplying the hourly rates cited by the plaintiff by the hours listed in plaintiff's counsel's time sheets.

Mr. Price's time and fees are as follows:

329.35 hours at $125.00/hour = $ 41,168.75
256.10 hours at $135.00/hour = $ 34,573.50
232.50 hours at $150.00/hour = $ 34,875.00
6.00 hours at $145.00/hour = $ 870.00
Total Price Fees = $111,487.25

Mr. Kowalsky's time and fees are as follows:

69.00 hours at $125.00/hour = $ 8,280.00
21.75 hours at $130.00/hour = $ 2,827.50
4.00 hours at $140.00/hour = $ 560.00
Total Kowalsky Fees = $ 11,667.50

Ms. Lindeman's time and fees are as follows:

621.05 hours at $ 90.00/hour = $ 55,894.50
56.20 hours at $ 95.00/hour = $ 5,339.00
556.40 hours at $100.00/hour = $ 55,640.00
Total Lindeman Fees = $116,873.50

Mr. Sonneberg's time and fees are as follows:

8.70 hours at $ 90.00/hour = $ 783.00
70.65 hours at $100.00/hour = $ 7,085.00
Total Sonnenberg Fees = $ 7,868.00

Law Clerk hours and fees are as follows:

139.60 hours at $ 30.00/hour = $ 4,188.00
128.75 hours at $ 40.00/hour = $ 5,150.00
Total Law Clerk Fees = $ 9,338.00

Paralegal hours and fees are as follows:

224.25 hours at $ 45.00/hour = $ 10,091.25
1.50 hours at $ 50.00/hour = $ 75.00
Total Paralegal Fees = $ 10,166.25

The lodestar figure is the sum of these totals:

Price Fees = $111,487.25
Kowalsky Fees = $ 11,667.50
Lindeman Fees = $116,873.50
Sonnenberg Fees = $ 7,868.00
Law Clerk Fees = $ 9,338.00
Paralegal Fees = $ 10,166.25
Lodestar Total = $267,400.50

The lodestar figure, therefore, is $267,400.50.[2] The plaintff reqests that the lodestar be increasedby 40 per cent. Defendant requests that the figure be reduced by 80 per cent. To resolve this issue, the Court must make findings on the *Barber* factors, as listed *ante*.

The time expended on this case certainly was extensive. However, the Court believes that such time and labor are adequately represented in the hourly figures used to compute the lodestar. The antitrust questions raised were novel and difficult. Defendant admits that the verdict broke new ground in the antitrust field. This factor weighs somewhat towards increasing the lodestar. Also, a high degree of skill was necessary, and was, in fact, utilized, to perform the services rendered. This factor, in combination with the fact that the customary fees for antitrust work is somewhat higher than that charged by plaintiff's counsel in this case, also weighs towards increasing the lodestar. Plaintiff's counsel's lost opportunity cost in presenting this litigation (the fact that counsel were not paid in full during this litigation) also merits somewhat of an increase in the lodestar. The Court does not believe that the counsel's expectations, at the beginning of the litigation, the time limitations, the experience, reputation, and abilities of the attorneys, the undesirability of the case in the community, or the nature of the relationship between the attorneys and the client warrant any adjustment at all to the lodestar. The Court does believe that the fact that the lodestar figure is routinely increased in similar cases (antitrust) warrant some increase to the lodestar. With regard to the amount in controversy and the results obtained, the Court believes that the fact that there were several claims in this case, and only one claim, antitrust, allowed for the recovery of fees, and the fact, as discussed *ante*, that it is virtually impossible to separate the hours spent in a claim-by-claim manner, weighs towards decreasing any addition to the lodestar, but not to the extent of a net decrease, as suggested by the defendant.

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[2] The lodestar figure calculated by the Court is $38.00 higher than that submitted by plaintiff. This is apparently due to an addition error on someone's part. In view of the large numbers involved in this fee petition, the Court does not believe this difference to be material.

In sum, the Court believes that the factors that favor increasing the lodestar slightly outweigh the factor that favors decreasing the lodestar. The lodestar figure, thereforce, will be increased by ten per cent.

Plaintiff is awarded attorney's fees in the amount of $294,140.55 (267.400.50+26,740.05).

IT IS SO ORDERED, this 24th day of November, 1987.

/s/ Frederic N. Smalkin
FREDERIC N. SMALKIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. S 86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

MEMORANDUM AND ORDER

[Filed Dec. 11, 1987]

Plaintiff has moved for supplemental attorney's fees in the amount of $18,827.60 for time spent preparing the fee application and responding to defendant's post-trial motions. Defendant has responded. No hearing is necessary to decide this motion. Local Rule 6, D. Md.

Plaintiff claims a lodestar amount for attorney and law clerk time of $17,116.00. Plaintiff seeks to have that amount increased by the ten per cent factor that the Court used in awarding fees in the original fee petition. A good percentage of the time claimed relates to responding to the defendant's j.n.o.v. motion. Although that motion and plaintiff's response involved discussion of antitrust issues, they also dealt substantially with issues of contract law, particularly U.C.C. issues. Plaintiff has not separated the time spent working on the contract issues, as it did in the original fee petition. Defendant argues, and the Court agrees, that plaintiff should not be awarded the full amount attributable to the j.n.o.v. response.

The Court has considered the twelve factors enumerated in *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n.28 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978). The Court agrees with defendant that the factors that supported an increase in the original petition do not control with respect to these post-judgment fees. The antitrust issues were researched thoroughly before and during the trial and, thus, were not particularly novel at the post-judgment stage of the litigation. Also, the preparation of the response to the j.n.o.v. motion (and the preparation of the fee petition) required no high degree of skill. Plaintiff's counsel does not face lost opportunity costs here, because the work was recently done and payment will be received relatively soon. Plointiff's counsel's low rate as compared to other antitrust counsel has been considered, but it does not outweigh the fact that the j.n.o.v. response contained a substantial amount of dispute about contract issues. Defendant does not challenge the hours spent on the fee petition, and the Court believes that fees for these hours should be fully recovered. Accordingly, the Court awards full payment for the hours spent on the fee petition. Because the j.n.o.v. motion and response addressed contract issues and antitrust issues substantially equally the Court believes that a reduction of 50 per cent is appropriate with regard to the hours spent on the j.n.o.v. response. After reviewing the time sheets submitted, the Court has determined that $9,057.50 worth of the claimed fees relate to hours spent working on the response to the j.n.o.v. motion. That amount will be reduced by 50 per cent, to $4,528.75. Therefore, the amount awarded for hours spent in relation to the j.n.o.v. response will be $4,528.75. The amount awarded for the remaining hours (attributable to the fee petition) will be the full amount of $8,058.50.

Accordingly, plaintiff is awarded supplemental attorney's fees in the amount of $12,587.25 ($8,058.50+ $4,528.75).

IT IS SO ORDERED, this 11th day of December 1987.

/s/ Frederic N. Smalkin
FREDERIC N. SMALKIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. S 86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

MEMORANDUM AND OPINION

[Filed Dec. 15, 1987]

The jury in this case returned a verdict that found, *inter alia*, that the defendant violated the Robinson-Patman Act, 15 U.S.C. § 13, by an instance of price discrimination against plaintiff in late January and early February, 1986. This Court, on the basis of the jury's verdict, concludes that the Robinson-Patman Act was violated by the defendant's conduct. There is no need for further factual inquiry.

The Court has considered the proposed order of permanent injunction submitted by the plaintiff, as well as the defendant's memorandum in opposition thereto. The Court finds that the plaintiff has a statutory entitlement to a permanent injunction. 15 U.S.C. § 26. The Court, however, given the nature of the franchise relationship between plaintiff and defendant, the nature of the cigarette wholesaling business, which operates on unsecured credit at high volume and low profit margins, with low capitalization, and the utter impossibility of predicting the future worthiness of the plaintiffs, the plaintiff's future ordering requirements, or the defendant's valid future need to restrict or expand the open credit of the plaintiff and/or plaintiff's competitors, finds it utterly impossible to enter a detailed injunction purporting to govern the dollar amounts and other specific terms of the credit relationship between the plaintiff and the defendant on a permanent basis. Therefore, the Court rejects the specific credit terms proposed by the plaintiff in its proposed permanent injunction. The entry of such a decree would potentially involve this Court in the day-to-day running of the parties' businesses, which would be to burdensome to the Court, as well as too restrictive to be practical in the environment of the wholesale cigarette business, as it was portrayed by both parties at trial. Furthermore, such a detailed decree is not justified by the facts proved at trial, which involved a unique situation arising out of the bankruptcy of a major competitor of plaintiff, with whom Mr. Kline had had strong prior ties. The recurrence of such a *sui generis* situation is practically impossible.

The Court will, however, enter an order that permanently prohibits the defendant from unlawfully discriminating in price, including as to credit terms, against the plaintiff in any manner prohibited by the Robinson-Patman Act, and the Court will retain jurisdiction to enforce this order through appropriate proceedings for civil contempt or otherwise, should the plaintiff, in the future, show itself to have been discriminated against in response of price by actions of the defendant.

Upon the filing of the permanent injunction, this case will be closed.

/s/ Frederic N. Smalkin
FREDERIC N. SMALKIN
United States District Judge

Dated: December 14th, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S-86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

PERMANENT INJUNCTION

[Filed Dec. 15, 1987]

For the reasons stated in a Memorandum Opinion of even date herewith, which is incorporated by reference herein as if fully set forth in the body of this Injunction, IT IS, by the Court, this 14th day of December, 1987, ORDERED, ADJUDGED, and DECREED:

1. The defendant BE, and its hereby IS, permanently enjoined and restrained from unlawfully discriminating against the plaintiff in respect of price (including as to credit terms) in its sales of products to the plaintiff, in any fashion that violates the Robinson-Patman Act, 15 U.S.C. § 13; and

2. That this Court retains jurisdiction to enforce this Injunction by appropriate proceedings, including a motion for civil contempt.

/s/ Frederic N. Smalkin
FREDERIC N. SMALKIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

TAXATION OF COSTS

Civil Action No. S-86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

ORDER

Pursuant to the Stipulation between the parties filed on January 25, 1988, costs are hereby taxed against the Defendant and in favor of the Plaintiff, Thomas J. Kline, Inc., in the amount of Six Thousand Two Hundred Forty-Six Dollars and Sixty Cents ($6,246.60).

JOSEPH A. HAAS
Clerk

By: /s/ Gary M. Sapperstein
GARY M. SAPPERSTEIN
Chief Deputy Clerk

Dated: January 28, 1988

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-3011

THOMAS J. KLINE, INC.,
Plaintiff-Appellee
v.
LORILLARD, INC.,
Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

[Filed Sep. 14, 1989]

The appellee's petiiton for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered ~~at the~~ direction of Judge Chapman with the concurrence of Judge Winter. Judge Sprouse dissents.

For the Court,

/s/ John M. Greacen
Clerk

[EXCERPTS FROM TRIAL TRANSCRIPT BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED SEPTEMBER 23, 1987]

* * * *

[801] THE COURT: Members of the jury, now that you have heard all of the evidence and the arguments of the attorneys, it is my job to give you the instructions of the court concerning the law applicable to this case.

As I told you earlier, at the close of the instructions, if there is anything in them that is contrary or different from what I told you at the outset of the case, it is the closing instructions that govern your deliberations. And I will tell you now that you will not get a written copy of the instructions, and it is what you hear that governs your deliberations.

Furthermore, it is your duty as jurors to follow the law as I will state it to you and to apply it to the facts that you find to be in evidence in the case. Do not single out one instruction alone as stating the law, but you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

In my instructions to you on the law of this case, if I state any rule, direction or idea in varying ways, no emphasis is intended by me and none must be inferred by you. You are not to single out any certain sentence or individual point or instruction and ignore the others. Rather, you are to consider all the instructions as a whole, and you are to regard each in light of the others.

Regardless of any opinion you may have as to what the [802] law is or ought to be, it would be a violation of your sworn duty to base your verdict upon any view of the law other than what I have given you in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base your verdict upon anything other than the evidence you have heard here in the courtroom and the exhibits which have been received.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as I will state it to you, and reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

You and only you are the judges of the facts. If any expression of mine or anything at all I may have done or said or not done or said would seem to indicate to you any opinion [803] that I might have regarding the issues of fact, you must disregard it. You are the ones who decide the facts, not me. You may consider not only the evidence to which I may refer and the evidence to which you may have been referred by counsel in their closing arguments, but you may consider, of course, any testimony or exhibits in the case, whether or not referred to by me or counsel, and regardless of who introduced them, which you may believe to be material.

You must consider the evidence in the case. The term "evidence" includes the testimony of the witnesses, the deposition testimony, and the exhibits admitted into evidence.

Remember, the statements, objections, and arguments of the lawyers are not evidence. The function of the lawyers is simply to point out those things that are most significant, or most helpful to their side and, in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, though, it is our own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding on you.

Now, while you are to consider only the evidence in the case, you are permitted to draw such inferences, such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you make make deductions and reach conclusions [804] that reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Now, there have been certain admissions in the trial. Mr. Price read them into the record earlier. Of course, you must accept any admitted facts as having been conclusively established.

Now, I said a minute ago that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility—that means believability—of the witnesses and the weight to be given to each witness' testimony.

In weighing the testimony of a witness you should consider his relationship to the plaintiff or to the defendant; his interest, if any, in how the case comes out; his manner of testifying, his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness, and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Furthermore, I tell you that the weight of the evidence is not necessarily determined by the number of witnesses or exhibits pointing to the existence or [805] nonexistence of any particular fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Now, a witness may be discredited or impeached, which means the same thing, by contradictory evidence, by showing that he testified falsely concerning a material matter or by evidence that at some other time the witness has said or done something or has failed to say or do something that is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The rules of evidence provide that, if scientific, technical, or other specialized knowledge might assist you in understanding the evidence or in determining—that means deciding—a fact in issue, a witness qualified as an expert by knowledge, skill, training, experience, or education may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given [806] in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion.

In this case there has been a conflict in the testimony of expert witnesses. By considering and weighing the credibility and qualifications of the respective experts who have testified; the logic of the reasons given in support of their opinion; the other evidence in the case which favors or opposes a given opinion; and by using your own experience and good judgment as reasonable and intelligent people, you must resolve that conflict and determine which of the opinions to accept as accurate.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of an issue. One is direct evidence, such as the testimony of an eyewitness, and the other is indirect or circumstantial evidence, that is, the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. As a general rule, there is no distinction between direct and circumstantial evidence, but simply the law requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

You are to consider only the evidence presented, and you may not guess or speculate as to the existence of any facts in this case. However, the rule against guessing or [807] speculation does not limit you to accepting the bald statements of the witness. On the contrary, you are permitted to draw from facts which you find to have been proved such reasonable inferences as seem justified in the light of your own experience. Inferences are deductions or conclusions which reason and common sense lead you to draw from facts which have been established by the evidence in the case.

Now, at times during this trial I have made certain rulings on points of law and evidence. You should not be concerned by these rulings or the reasons for them. It is solely a matter for me to decide, and you should not draw any factual conclusion or inference from these rulings.

In admitting evidence to which an objection has been overruled, I do not determine the weight to be given to the evidence. That is up to you. Of course, you must not guess what answer might have been given to any question to which an objection has been sustained, and, of course, you may not speculate as to the reason the question was asked or the objection sustained.

Now, after you have considered all of the factors bearing upon the credibility of the witness that I have mentioned to you, you may conclude to reject all of the testimony of a particular witness, none of the testimony of that witness, or part of the testimony of that witness. In [808] other words, you may give the testimony of any witness such credibility and weight, if any, as you may think it deserves.

As I indicated to you before, you are not bound to decide any issue in accordance with the testimony of any particular number of witnesses, which does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witness which does produce it. In other words, the test is not who has brought the greater number of witnesses or produced the greater quantity of evidence, but which witness and which evidence appeals to your minds as being more accurate and otherwise trustworthy.

Now, in this case, of course, we have two principal claims that are claimed, one for what is called breach of contract and the other for what is called price discrimination or what you might have heard referred to as the Robinson-Patman Act.

As to each of these claims, the plaintiff has the burden of proving the claim by a preponderance of the evidence as to each and every essential element of the claim.

The defendant has asserted an affirmative defense as to which it has a burden of proof, and that is the question of the Statute of Frauds, that is, whether there is sufficient written memoranda under the contract to sustain its enforceability, and I'll tell you about that in a minute.

For the time being, the important thing is to [809] remember what the burden of proof means. In this case the burdens of proof are by what is called a preponderance of the evidence. They remain with the party having that burden throughout the trial. A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has a more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. That is the test. The question of the preponderance of the evidence is more likely true than not true.

If the plaintiff or the defendant, whichever has the burden on a particuar issue, has not sustained that requirement, no matter how slight it is—but it has to be sustained by some amount. In other words, if your minds are equally balanced on the issue or there has not been a preponderance adduced, that is, if the scales are not tipped in the favor of the party having the burden, then that party has not sustained the burden. The scales are in even balance. To sustain the burden, the party has to tip the scales, however slightly, but somewhat, in his favor. Otherwise, he has not sustained the burden.

To put it in another format, to establish something by a preponderance of the evidence simply means to prove that it is more likely true than not true, more likely so than not so. Any way you look at it, it is a question of more likely.

[810] Now in determining whether any party has sustained its burden of proof, you, of course, are not limited to the witnesses or evidence put on by that party, but you may consider all of the evidence in the case, all of the testimony, all of the exhibits, regardless of who may have introduced them.

I would instruct you in this case, as I already have instructed you, that you are not to give any consideration to the fact that this Court or any other court issued a preliminary injunction maintaining a certain relationship between the parties pending the outcome of this particular trial. That is, you are not to consider the issuance of the injunction as any expression by the Court of any opinion or finding of any issue of fact as to who is right and who is wrong. That is up to you to decide. You decide who has sustained their burdens of proof in this case.

Now, I will briefly summarize for you the claims and defenses in suit, which you are going to have to decide on in a few minutes. The plaintiff claims that it entered into an agreement with the defendant whereby the defendant promised to supply the plaintiff with its reasonable requirements for cigarettes and related products, and that the defendant breached that agreement by failing to fill an order dated January 31 of '86. Defendant says that there was no enforceable contract, and that is, of course, the defense of [811] statute of frauds, which is a concept in the new law that requires a certain written memorandum of contract before it is enforceable; and I will tell you some more about that in a minute.

The defendant also claims that, even if there was an enforceable contract, it didn't violate that contract.

The plaintiff's second claim—and these all arise from the same basic facts, which have to do, of course, with the events of the end of January, beginning of February.

The plaintiff's other claim is that the defendant engaged in price discrimination in violation of the federal law called the Robinson-Patman Act and a Maryland law that is similar to the federal law; and I will instruct you a little bit later on as to just what the requirements of those laws are.

Under certain circumstances, these laws prohibit a seller from selling goods of like grade and quality to different purchasers who compete with each other at different prices. However, the acts do not prohibit all price differences. In this case, the plaintiff claims that the defendant sold cigarettes and other items to plaintiff's competitors on better credit terms, and therefore at lower net prices than those paid by the plaintiff.

Now, of course, the defendant, as I indicateed to you, denies all wrongdoing. The defendant says we didn't violate [812] the contract, even if there was an enforceable one; and, furthermore, we didn't discriminate in price terms contrary to federal law.

Now, on those particular claims, that is, not violating the contract and not discriminating, the defendant doesn't have to prove itself innocent. It is, rather, up to the plaintiff to prove by a preponderance of the evidence that the defendant did these things. The only thing the defendant has to prove is what is called the affirmative defense of statute of frauds; and, of course, it has to prove that by a preponderance of the evidence, and I will explain that to you in a moment.

In particular, in regard to both the contract and price discrimination claims, the defendant has claimed that it acted reasonably and in good faith in restricting the plaintiff's credit and requiring cash in advance or a letter of credit, considering all the circumstances that were then and there obtained; and, of course, one of your jobs will be to determine whether it's accurate.

Now, in the first claim, which is the breach of contract—"breach" simply means violation of contract—the plainitff alleges that Lorillard entered into a contract with plaintiff to sell cigarettes to the plaintiff and that Lorillard violated the terms of that contract. The plaintiff has the burden of proving by a preponderance of the evidence [813] both the existence and the terms of the contract upon which it relies to establish a breach.

The contract term that is at issue in this case is the term concerning credit. There is also an issue of a requirements term, whether the particular order was a reasonable one within the requirements term. The requirements term is one that is essentially explained by law. The credit term, on the other hand, is bargained for between the parties. In that regard, you are going to have to determine the parties' intent as to the credit terms that Mr. Kline was to receive and whether and under what circumstances and to what extent the defendant could change its credit terms from time to time.

Now, I will instruct you that a contract is an agreement between two or more parties that creates rights or obligations based on promises and terms of the agreement.

Now, I told you about this thing called statute of frauds, and that is the first question you will answer on your interrogatory form. Interrogatories are a series of questions, that will ask you some questions that have short answers, and the answers should be yes or no;

and these questions are designed to elicit from you findings on the questions of fact of the case.

The first question will be whether the defendant has proved that the letter in question relied upon to establish [814] the contract, that is, that letter of January 15, 1986, plaintiff's exhibit number 10—the first question that the defendant has to prove is that it is insufficient to establish an enforceable written contract because it lacks a quantity term. Now, I'm not going to tell you what that is all about. This is the thing called the statute of frauds.

You are instructed that contract of the type alleged to have been made and sought to be enforced by the plaintiff here are required to be in writing to be enforceable. Now, not all the terms need be in writing and the writing need not be formal; and, in fact, the writing can be anything in writing that identifies the parties to the agreement and at least the quantity term of the agreement. This writing must be signed by the party against whom enforcement is sought, in this case the defendant. So, it has to be something in writing signed by the defendant that contains at least a quantity term. There is an issue of fact as to whether this writing contains a quantity term.

The only writing at issue in the case is the plaintiff's Exhibit 10. The parties disagree as to whether that letter contains a quantity term. It must contain a quantity term to satisfy the legal requirement for enforceability. "Enforceability," of course, means that, if there is a violation of it, you can collect the damages. If it is not enforceable, then there is no right to sue for [815] damages for violating it.

The plaintiff's position is that the language, "your request to purchase Lorillard products on a direct basis has been approved by our new accounts committee, and you have been added to our direct list of customers for full line as successor to W. B. Merrey & Sons, Inc.," refers to an agreement to supply plaintiff with all the cigarettes it needs. If that is what you find, then this would be a quantity term called a requirements contract and would be a sufficient writing to satisfy the statute of frauds.

So, you must decide what that quotation I just read to you from this January 15 letter means. You are instructed that, if you find that the language was understood by the parties to constitute an agreement to supply plaintiff with its requirements, then that is sufficient to satisfy the quantity term requirement. It is not necessary that a particular number, that is, numerical quantity, term be recited, only that the writing indicate that the quantity to be delivered under the contract is the party's requirements.

Now, as I said, the defendant has the burden of proving the insufficiency of the writing by a preponderance of the evidence, because this is a matter of affirmative defense.

You are also instructed that the terms "direct basis" and "direct list of customers for full line," as used by this letter are terms used in the cigarette wholesaling business. [816] If you should find that these terms, when used in a contractual arrangement for the supply of cigarettes to a wholesaler by a manufacturer are generally understood by parties in that trade to constitute an agreement for the manufacturer to supply the wholesaler with its reasonable requirements, then the language in the letter sufficiently states a quantity term.

In deciding this issue, you may consider the prior course of dealing between the parties and any trade usage or custom in the tobacco products distribution business.

A course of dealing is a sequence of previous conduct between the parties to this particular transaction that is fairly to be required as establishing a common basis of understanding for interpreting their expressions and other conduct.

A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justfy an expectation that it will be observed with respect to the transaction in question.

So, therefore, you are instructed that, if you find, considering the prior dealings and trade usage, that the parties should have understood the language in question to establish a requirements quantity term, then the writing is sufficient.

Now, you may find that the writing is insufficient. [817] If you so find, then you will go on to the next issue, which is called estoppel. If you find that the writing is insufficient, you still may find that there was an agreement which was enforceable if you find that the plaintiff has proved by a preponderance of the evidence that the doctrine called estoppel applies in this case.

Estoppel is—the easiest way to define it is it stops somebody from denying something. It is an effect of the voluntary conduct of a party whereby he is precluded from asserting rights that might otherwise have existed against someone else who has in good faith relied upon such conduct and has thereby been led to change his position for the worse. In other words, it is conduct that leads another party to change his position and rely on such conduct to his detriment.

In order to establish or prove the doctrine of estoppel, the party who has the burden of proof on that, the plaintiff, must have been misled, no matter how innocently, to his injury and changed his position for the worse, having believed and relied upon the representations of the party sought to be estopped.

Now, if you find either that the writing is sufficient or that there is an estoppel that makes the contract enforceable notwithstanding the insufficient writing, then you go on to determine whether the parties in fact entered into a contract whereby the defendant promised to [818] supply plaintiff with its reasonable requirements. In deciding whether there was an agreement and, if so, what the terms were, you may consider the writings, the parties' prior course of dealings, trade usage, the discussions between the parties, the discussions between the parties and their representatives, and any other circumstances surrounding the negotiations. Of course, the burden is on the plaintiff to prove by a preponderance of the evidence the validity and terms of the contract.

In order for a contract to be valid its essential terms must be sufficiently clear and certain so that the people involved can understand their rights and duties.

You are instructed that the contract must be interpreted so as to give effect to the parties' intentions at the time that it was done. If, when the contract was made, one party knew or should have known that the other party interpreted the contract in a certain way and did not object to that interpretation, the contract is to be interpreted in that way.

Now, one of the terms that is at issue here, of course, is the question of credit, and you must determine what the credit terms of the contract were, that is, what terms that the plaintiff proved existed with regard to cerdit.

If you do find that under the terms of the contract Lorillard had the right to change credit terms, that right [819] must have been exercised in good faith. Because Lorillard is a merchant, good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

Now, on the question of reasonable requirements, if you decide that the parties did enter into a contract whereby the defendant agreed to supply the plaintiff with its reasonable requirements, you then must decide whether the order that was placed on January 31 of '86 was in good faith and within reasonably foreseeable limits of the requirements estimated by the parties at the time of the contract.

If it was, then the defendant's failure to ship on the open credit was a breach of the contract, unless Lorillard had the right to change the open credit terms and exercise that right in good faith.

You are instructed that in a requirements contract no quantity unreasonably disproportionate to any stated estimate or, in the absence of any stated estimate, any normal or otherwise comparable prior requirements may be demanded. Reasonable elasticity in and good faith variations from prior requirements are permitted, as long as the requirements approximate a reasonably foreseeable figure.

If you find that the plaintiff's January 31, '86 order was unreasonably disproportionate, then the plaintiff may not recover damages for the defendant's failure to fill [820] it, because such a failure would not be a violation of the contract. The defendant was only obligated to ship reasonable orders under a requirements term.

As to the burden of establishing the existence of the term of the contract, the burden is on the plaintiff to establish by a preponderance of the evidence that the January 31, '86 order was not unreasonably disproportionate.

Now, talking about good faith, good faith here has the same meaning I just told you about. Both parties here are what is called merchants under the commercial law, and a merchant's duty of good faith is honesty in fact—that means was the person honest—and also the observance of reasonable commercial standards of fair dealing in the trade, and that is the standard that you are to determine, that is, whether or not it was reasonable.

Now, those are all the instructions on the breach of contract claim, with the expection of damages.

If you find that the defendant breached the contract, you must consider the damages, if any, to which the plaintiff is entitled because of that breach. The burden is on the plaintiff to prove by a preponderance of the evidence each item of damage it claims was caused by the defendant. In considering damages, you must keep in mind that your award must adequately and fairly compensate the plaintiff, but your award should not be based on guesswork.

[821] The plaintiff is entitled to be placed in the same situation as if the contract had not been broken. Its damages are the profits it would have made had the contract been performed. These damages are arrived at after deducting the amount that it would have cost the plaintiff to have performed the contract.

You are instructed that, in computing the plaintiff's damages, if any, you are to include any loss resulting from the general or particular requirements and needs of which the defendant had reason to know at the time of contracting and which the plaintiff could not reasonably prevent.

You are also instructed that a party has the duty to try to lessen, that is, mitigate damages it may suffer as a result of what another party has done. A party may not recover for any damage that it could have avoided by making a reasonable effort without risk of additional substantial loss or injury.

Now, the second claim in this case is the claim of price discrimination in violation of the federal law called the Robinson-Patman Act and the similar Maryland law. Under certain circumstances these laws prohibit a seller from selling goods of like grade and quality to different purchasers who are competing with each other at different prices. However, these acts do not prohibit all price differences. In this case, the plaintiff claims that the [822] defendant sold cigarettes and other items to his competitors on better credit terms and, therefore, at lower net prices than those paid by the plaintiff.

To prevail on these claims, the plaintiff must prove all of these elements I will name for you—there are four of them—by a preponderance of the evidence.

First, that the products involved in the sales were of like grade and quality. That has been admitted. There is no question about the fact that all of the Lorillard cigarettes are the same, no matter who buys them.

Second, that the defendant charged discriminatory—that means different—prices to different purchasers in actual sales transactions.

Third, that there is a reasonable possibility that the discriminatory prices may harm competition.

And, fourth, that the plainitff was injured in his business or property because of the discriminatory pricing.

If you find that the evidence is insufficient to prove any one of these elements by a preponderance of the evidence, then, of course, you must find for the defendant on these claims.

Now I will go into a little more detail on these elements.

Price discrimination means selling goods to one purchaser at a price that is different from that charged [823] another purchaser. The plaintiff, therefore, must prove that the defendant charged it a different price than the defendant charged other purchasers. In determining whether prices are different, you must determine the actual net prices paid by the purchasers. Net means you must take into account any rebates, allowances, discounts, or other terms or conditions of sale that may alter the actual net price paid. In this case the plaintiff claims that the other purchasers got a lower net price because they were given credit terms that were more liberal than those available to the plaintiff.

A difference in credit terms that is based on legitimate credit-granting criteria, however, such as the borrower's financial strength, business experience, credit history, net worth, capital, cash position, personal guarantees, and business success does not constitute price discrimination.

If the plaintiff has not proved that the defendant gave other purchasers favorable credit terms that were not available to the plaintiff and that were not based on legitimate business reasons, then your verdict must be for the defendant.

In order to establish a reasonable possibility of harm to competition, which is one of the other elements—remember, all four of the elements must be proved in this case. Three are at issue. I just told you about one, which [824] was the different terms, and now I will tell you about the competitive injury issue.

In order to establish a reasonable possibility of harm to competition, the plaintiff must prove a substantial difference in price in sales by defendant to the plaintiff and to other competing purchasers over a significant period of time. This inference of competitive injury may be overcome or rebutted if you find that defendant showed that any lost sales or profits were not caused by the price differential. The defendant claims here that a loss of sales or profits by the plaintiff did not result from the difference in credit terms. If, however, you find that the plaintiff actually lost significant profits or sales as a result of the alleged price discrimination, then competition has been harmed to that extent.

If, after considering the foregoing matters, you find that there is a reasonable possibility that defendant's alleged discriminatory pricing may have harmed competition, then you must find that plaintiff has proved this element of the Robinson-Patman Act claim. If you find that the alleged price discrimination did not have such an effect, if there was no reasonable possibility that the discriminatory pricing may have harmed competition, then, of course, you must find that the defendant did not violate the Robinson-Patman Act and find against the plaintiff.

[825] In order for the inference of competitive injury to arise, the price discrimination must not be insubstantial. Whether a particular price difference is substantial depends on the business in question. This is a question of fact for you to determine. The level of competition and the profit margins in the industry are factors to be considered in determining whether a price difference is substantial.

If you find that the defendant has violated this law on differential pricing, then you must decide if plaintiff is entiled to recover damages from the defendant.

The law provides that anyone who is injured by an antitrust violation such as this may recover damages for any injury to his business or property caused by the violation.

In order for plaintiff to establish that it is entitled to recover damages, it must prove that it was injured as a result of defendant's alleged violation of the antitrust laws. This is called proving causation or fact of damage. This does not require plaintiff to prove the dollar value of its injury. It only requires the plaintiff to prove that it was in fact injured by the defendant's alleged antitrust violation.

If you find that the plaintiff has established that it was in fact injured, you may then go on to consider the amount of plaintiff's damages. It is important to understand, however, that injury and amount of damage are different [826] concepts and that you cannot consider the amount of damage unless and until you have concluded that plaintiff has established by a preponderance of the evidence that it was in fact injured by differential pricing.

To establish injury, the plaintiff must have offered evidence which establishes as a matter of fact and with a fair degree of certainty that the defendant's illegal conduct, A, was illegal and, B, that it was a material cause of the plaintiff's injury. This means that the plaintiff must have proved that some damage flowed to it as a result of defendant's alleged antitrust violation. Antitrust is the Robinson-Patman Act on differential pricing.

Plaintiff is not required to prove that the defendant's alleged antitrust violation was the only cause of its injury, nor need the plaintiff eliminate all other possible causes of injury to establish this causation element. It is sufficient if the plaintiff has proved that the alleged antitrust violation was a material cause of its injury. However, if you find that plaintiff's injury was caused by something other than the alleged antitrust violation, then you must find the plaintiff has failed to prove that it is entitled to recover damages from the defendant.

The injury that the plaintiff must establish must be to its business or property. The term "business" includes any commercial interest or venture, and you are instructed to find [827] that it has been injured in its business if you find that it has suffered injury in any of its commercial interests or enterprises as a result of the defendant's alleged antitrust violation.

Property includes anything of value which the plaintiff owns or possesses. The plaintiff has been injured in his property if you find that anything that was of value which it owns or possesses has been damaged as a result of the defendant's antitrust violation. You are further instructed that the plaintiff has been injured in its property if you find that it has lost money as a result of the defendant's alleged antitrust violation.

Now, if you find that the plaintiff has been injured by an antitrust violation committed by the defendant, the law says that the plaintiff should be fairly compensated for all damages to its business and property which were a direct result or likely consequence of the conduct which you have found to be unlawful.

A defendant's violations of the antitrust laws often create a situation in which it is hard to determine the precise amount of damages suffered by the plaintiff. The plaintiff's right to be fairly compensated should not be affected by any difficulty you may have in determining the precise amount of the recovery so long as there is a reasonable basis in the evidence for your award. You may not, [828] however, calculate damages based only on speculation or guesswork, and you must remember that you can award plaintiff damages only for injuries caused by a violation of the antitrust laws under this theory. You may not award damages under this theory for injuries caused by other factors.

If you find that the defendant violated the antitrust laws and that this violation caused injury to the plaintiff's business or property, as I have described it for you, then you go on to determine the amount of damages, if any, the plaintiff has proved by a preponderance of the evidence.

The plaintiff is entitled to recover any profits it lost as a result of an antitrust violation caused by defendant. Profit here means net profit and simply means the amount by which the plaintiff's gross revenues would have been exceeded all of the costs and expenses that would have been necessary to produce those revenues. In other words, your net profit is what you have left over after taking your gross profit—gross profit is the difference between what you sell the goods for and what you paid for them. In other words, if you paid three dollars and sell for five dollars, your gross profit is two dollars. In order to get the net, you have to take off of that two dollars all of the expenses of sales, like the salesmen's commissions, and heat, power, and light, and rent, et cetera like that. So, let's say that is a dollar, and that leaves you with a net profit of one dollar. [829] So, the lost profits measure here is net profit, how much net is there after you take off all the expenses connected with the sales, including the cost of the sale and the initial cost for goods.

In determining the amount of any loss of profits by the plaintiff, you are entitled to compare plaintiff's actual net profits in a period before the alleged antitrust violation with its actual net profits or less afterwards, so long as you find that the earlier operating experience provides a reliable guide for estimating what plaintiff's actual experience would have been in the absence of the alleged antitrust violation.

The plaintiff also seeks damages here for future lost profits. If you find that the defendant's alleged antitrust violation has caused plaintiff to lose profits it could otherwise reasonably expect to earn in the future, you may award plaintiff damage for those future lost profits. I have already instructed you on how to figure lost profits in connection with this claim, and you should use the same method for calculating future lost profits, if you find the plaintiff is entitled to an award with respect to lost profits.

The plaintiff has presented evidence that, had it not been for defendant's alleged antitrust violation, it would have earned certain profits for a five-year period into the future. In evaluating this claim for future lost profits, you [830] must make a just and reasonable estimate both of the amount of profits, if any, the plaintiff would have earned in future years and the length of time it would have earned them. For years and the length of time it would have earned them. For example, you should consider the various uncertainties that could affect the future success of plaintiff's business, such as general market conditions, competition plaintiff would face in the future, and the like. You may also consider whether it is reasonable to project the stream of profit into the future for a period of five years as plaintiff has done in this case. In other words, if you find that the plaintiff is entitled to some award of damages for future lost profits, you must consider all the evidence presented to you concerning those future or anticipated profits and award what you consider to be a reasonable estimate of them.

If you make an award of damages to the plaintiff that includes profits that you find plaintiff would have made in the future except for the alleged antitrust violation, the amount of profits which would be made after the date of your verdict must be discounted to its present value at a rate of interest which you find reasonable. This, then, simply means that the right to receive money today is worth a certain amount less than what it would be in the future, and the reason is because the amount of money that is received today could be invested in investments today. So, $100 today, if you earn $10 in interest on it, would be $110 a year from now. [831] Therefore, if you say, all right, a year from now I will pay you $100, that $100, in order for it to be discounted in terms of value would have to come down to 90. So, you would have 90 plus 10 equal 100 a year from now. That's an example. It's not mathematically correct. It would actually be something a little more than $90, probably around $92. But, in any event, if you find there have been lost profits, I will further instruct you that Mr. Goldstein did do a discounting in his figures to reduce to present value. And, again, a reduction to present value is simply to compensate for the fact that the money you get now is really worth more than the money that you get in the future, because the money that you get now you can go ahead and invest and get more money. So, that is what discounting is about.

Also in this case is plaintiff has claimed that the defendant's alleged antitrust violation has prevented it from expanding. It is not necessary that the plaintiff has actually expanded this business to recover damages, if you find that the defendant's alleged antitrust violation prevented the plaintiff from doing so. The plaintiff must prove, however, that it had an intention to expand the business and that it had taken some steps to prepare to do so.

In determining whether or not plaintiff has demonstrated this intention and preparedness, you may consider such elements as the following: the background and experience [832] of the principals and employees of the plaintiff; his ability to finance the business and purchase the necessary facilities and equipment; affirmative steps taken by him to enter into the new business, and so forth.

Ultimately in order to award the plaintiff damages related to its failure to expand into this new business, you must determine that, had it not been for the defendant's alleged antitrust violation, plaintiff would have expanded into this new business.

I would further instruct you that there is mitigation with regard to the antitrust violation, as there was mitigation with regard to the contract violation. The theory is the same.

Plaintiff may not recover damages for any portion of its injury which plaintiff could have avoided through the exercise of reasonable care and prudence. The law requires an injured party to take all reasonable steps that it can to avoid further injury and thereby reduce its loss. If a plaintiff fails to take reasonable steps available to it and failure to take those steps results in greater harm to the plaintiff than he would have suffered had he taken the steps, then the plaintiff may not recover damages for injury which would have been avoided had it taken reasonable actions to reduce its injury.

In determining whether plaintiff has failed to take [833] reasonable measures to limit its damages, you must remember that the law requires the plaintiff to use only those measures which are reasonably practicable under the circumstances. In determining reasonabless upon his conduct, you should take into account the evidence concerning the circumstances as they appeared to the plaintiff at the time, rather than in hindsight. Plaintiff is given a wide latitude in deciding how to handle a situation, so long as what he did was not unreasonable in light of the existing circumstances.

The burden of proof on mitigation is on the defendant. That is, the defendant must prove by a preponderance of the evidence that the plaintiff acted unreasonably in failing to take specific steps to minimize or limit its loss, its failure to take these steps resulting in losses being greater than they would have been had the steps been taken, and the amount by which plaintiff's loss would have been reduced had the plaintiff acted.

And, finally, with regard to damages, I will instruct you that any damages awarded by you are nōt income within the meaning of the federal and Maryland income tax laws, and the plaintiff will not owe or have to pay any income tax on the amount awarded as damages.

Now, the fact that I have given you instructions concerning the issue of plaintiff's damages should not be interpreted by you in any way as an indication that I believe [834] that the plaintiff should or should not prevail in the lawsuit. Obviously, my instruction on that is, if you find that the plaintiff has made out its case, then you have to consider, of course, the damages.

Your verdict must represent the considered judgment of each of you. In order to determine a verdict, it is necessary that all of you agree. In other words, it must be unanimous, that is, for the plaintiff, for the defendant, and as to the amount of any damages.

It is your duty as jurors to consult with one another and to deliberate with a view towards reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence in the case among your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion, if you become convinced it is erroneous; but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere expedient purpose of returning a verdict.

Remember at all times you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

After you retire to the jury room, Mr. Alexander, [835] your foreman, will preside over your deliberations. He has no more vote than the rest of you—each of you has one vote—but his general duty is to keep order and to take the votes and count them up and also, when you have reached a verdict, to fill out the interrogatories and the general verdict form. Now, even though it is signed and dated by him, it must represent your unanimous decision.

Now let me walk you through these interrogatories, and a couple of you can look on with Mr. Alexander on them.

The first question is: Has the defendant proved that the January 15, '86 letter is insufficient to establish an enforceable written contract because it lacks a quantity term under the requirements; check one, yes or no.

Now, you see, these are very simple instructions to follow.

If you answer no, you go down to question three. If you answer yes, then you go on to question two.

Question two says: Has the plaintiff proved that Lorillard is precluded from asserting the writing requirement by estoppel?

That I have defined for you. It means a reasonable amount of reliance on conduct that has misled the other party to his detriment.

And you answer that yes or no. Then, if you answer no there, you immediately go to question number eight. We [836] will get to question number eight in a minute. If you answer yes, then you go on to question three.

Now, when you get down to question three, you are called upon to decide whether the plaintiff proved that the parties entered into a contract whereby the defendant promised to supply the plaintiff with its reasonable requirements on open credit terms. Answer yes or no. If the answer is no, you go down to question eight. If you answer yes, you go down to question four.

So, you see, after each question, you just simply answer yes or no and then follow the road map here for where to go.

Question four asks you if the plaintiff proved that its order of January 31, '86 was in good faith and within reasonably foreseeable limits of the requirements estimated or considered by the parties at the time of the contract. Answer yes or no. Then, again, if you answer no, you go on to question eight. If you answer yes, then you drop down to five.

Five: Do you find that under the terms of the contract Lorillard was permitted to change the plaintiff's credit terms. If you answer no, you go to seven; and, if you answer yes, you go on to six.

Six: Do you find that in changing plaintiff's credit terms, Lorillard acted honestly and in observance of [837] reasonable commercial standards; answer yer or no. Depending on your answer, you either go to eight or seven.

And then, seven, if you get there, calls on you to determine the damages, taking into account any mitigation, that has been proved as a result of the breach of contract. Now, of course, if you never get to that, you don't fill it out.

On question seven, of course, you are the ones who determine the damages. If you get to question seven, you decide on any amount, from zero to whatever you determine.

Eight has to do with the Robinson-Patman Act, and I am not going to go through all the questions there. They are simply the four elements—actually the three elements that are in issue here under the Robinson-Patman Act, and there is a similar roadmap that either gets you to 12 or to 9, 10, and 11.

Now, when you get to 12, it just says, if you have awarded damages, to itemize them under certain numbers in the damages section on the verdict form; and then you will go on to the general verdict form, which is the last paper you have. You answer this form after you have completed your interrogatories and in a manner consistent with those answers. In other words, if you have not found a violation of the Robinson-Patman Act, if you have not found a violation of the breach of contract, then, if you have found neither of those, [838] of course, you have found for Lorillard, and you check "Lorillard."

If you find one violation, either breach of contract or the Robinson-Patman Act, then you have found for the plaintiff, you check the plaintiff, and you go on to the amount of damages in question seven or eleven, or both, if you find there has been a breach of contract and a Robinson-Patman Act or antitrust violation.

So, we tried to do this to make this a very easy sequence of steps for you to follow through these interrogatory questions and on the general verdict form. I know it is hard to understand, just going through it very quickly.

This will also help you, of course, logically to go through the various issues that have been presented to you for your deliberation.

Now, as I said, Mr. Alexander is the foreman. After you have reached the unanimous agreement on the verdict, you have him fill it in, date it, and sign it, and then return to the courtroom.

Now, if during the course of your deliberations you should desire to communicate with me, simply put your message in writing, signed by the foreman, and tap on the door. The marshal will get us all together. It may take a few minutes to get us all together. We have to get us all together so [839] that we can address your question either orally or in writing.

I would caution, however, with regard to any message or question you might send out, Mr. Alexander, do not specify any numerical division among the jury. In other words, don't say we can't decide this because it is three/three, four/two, or whatever.

When you have reached a verdict, all you have to do is write it on a little piece of paper. Don't give those to the marshal. Just write it on a little piece of paper that says, "We have reached a verdict," and sign it, and the marshal will get us all together.

Now, in conclusion, let me remind you that your verdict must be unanimous, reflecting the judgment of each and every one of you. You should approach the issues of this case as men and women of affairs and common sense in the manner in which you would approach any important matter that you have occasion to determine in the course of your everyday business. Consider it in the jury room deliberately and carefully in light of the instructions I have given you, and use the same common sense and intelligence that you would apply in determining any important matter that you have to decide in the course of your own affairs.

All right, counsel. Approach the Bench, please.

(Thereupon, the following proceedings were had at the Bench, out of the hearing of the jury.)

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. S 86-1088

Thomas J. Kline, Inc.

v.

Lorillard, Inc.

JURY INTERROGATORIES

[Filed Sept. 23, 1987]

1. Has the defendant proved that the January 15, 1986 letter is insufficient to establish an enforceable written contract, because it lacks a quantity term (i.e., "requirements")? (Check one.)

—— Yes

[✓ —— No]

If you answered "No," skip down to Question 3. If you answered "Yes," go on to Question 2.

2. Has the plaintiff proved that Lorillard is precluded from asserting the writing requirement by estoppel? (Check one.)

—— Yes

—— No

If you answered "No," skip down to Question 8. If you answered "Yes," go on to Question 3.

3. Has the plaintiff proved that the parties entered into a contract whereby the defendant promised to supply

the plaintiff with its reasonable requirements on open credit terms? (Check one.)

[✓ Yes]

—— No

If you answered "No," skip down to Question 8. If you answered "Yes," go on to Question 4.

4. Has the plaintiff proved that its order of January 31, 1986 was in good faith and within reasonably foreseeable limits of the requirements estimated or considered by the parties at the time of contract? (Check one.)

[✓ Yes]

—— No

If you answered "No," skip down to Question 8. If you answered "Yes," go on to Question 5.

5. Do you find that under the terms of the contract Lorillard was permitted to change the plaintiff's credit terms?

—— Yes

[✓ No]

If you answered "No," skip down to Question 7. If you answered "Yes," go on to Question 6.

6. Do you find that, in changing the plaintiff's credit terms, Lorillard acted honestly and in observance of reasonable commercial standards of fair dealing in the trade?

—— Yes

[✓ No]

If you answered "Yes," skip down to Question 8. If you answered "No," go on to Question 7.

7. What damages, if any, have been proved (taking into account any mitigation) to have occurred as a result of the defendant's refusal to honor the January 31, 1986 order on existing credit terms? (Fill in an amount, or 0, whichever applies.)

$1,000,000.00
____

Go on to Question 8.

8. Has the plaintiff proved that the defendant charged the plaintiff a different net price than the defendant charged plaintiff's competitors? (Check one.)

—— [✓ Yes]

—— No

If you answered "No," skip down to Question 12. If you answered "Yes," go on to Question 9.

9. Has the plaintiff proved that the difference in credit term offered it was not based on legitimate credit-granting criteria? (Check one.)

—— [✓ Yes]

—— No

If you answered "No," skip down to Question 12. If you answered "Yes," go on to Question 10.

10. Has the plaintiff proved that the price differential resulted in a reasonable possibility of harm to competition? (Check one.)

—— [✓ Yes]

—— No

If you answered "No," skip down to Question 12. If you answered "Yes," go on to Question 11.

11. What damages, if any, have been proved (taking into account mitigation) to have occurred as a result of Lorallard's price differential? (Fill in amount, or 0, whichever applies.)

$526,733.00

12. If you awarded damages in either Question 7 or Question 11, or both, insert the numbers in the damages section of the General Verdict Form.

Dated: September 23, 1987

/s/ James F. Alexander
JAMES F. ALEXANDER
Foreman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S 86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

GENERAL VERDICT

(Answer this form after you have completed your Interrogatories and in a manner consistent with those answers).

We, the jury, find for:

✓ Thomas J. Kline, Inc., in the amount of:

$1,000,000.00	from Question 7
$526,733.00	from Question 11

—— Lorillard, Inc.

Dated: September 23, 1987

/s/ James F. Alexander
JAMES F. ALEXANDER
Foreman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S 86-1088

THOMAS J. KLINE, INC.

v.

LORILLARD, INC.

MASTER JURY INSTRUCTIONS

[Filed Oct. 5, 1987]

COURT'S INSTRUCTION NO. 1
(Introduction)

Members of the Jury:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply the law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

[NOTE]

1 BASIC PATTERN JURY INSTRUCTIONS, Civil Cases, U.S. Fifth Circuit.

COURT'S INSTRUCTION NO. 2

Instructions as a Whole

In my instructions to you on the law of this case, if I state any rule, direction or idea in varying ways, no emphasis is intended by me and none must be inferred by you. You are not to single out any certain sentence or individual point or instruction and ignore the others. Rather, you are to consider all of my instructions as a whole, and you are to regard each instruction in light of all others.

[NOTE]

Local Boilerplate.

COURT'S INSTRUCTION NO. 3

PATTERN JURY INSTRUCTIONS

2B

DUTY TO FOLLOW INSTRUCTIONS (CORPORATE PARTY INVOLVED)

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A ———— is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including ————, stand equal before the law and are to be dealt with as equals in a court of justice.

COURT'S INSTRUCTION NO. 4

Jury Determines Facts

You and only you are the judges of the facts. If any expression of mine or anything I may or may not have done or said would seem to indicate any opinion relating to any factual matters, I instruct you to disregard it. You may consider not only the evidence to which I may refer, and the evidence to which you may have been referred by counsel in their arguments, but you may also consider any testimony or exhibits in the case, whether or not referred to by me or by counsel, which you may believe to be material.

[NOTE]

Local Boilerplate.

COURT'S INSTRUCTION NO. 5

CONSIDERATION OF THE EVIDENCE, ETC.

As stated earlier, it is your duty to determine the facts, and in so doing, you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

[NOTE]

3A BASIC PATTERN JURY INSTRUCTIONS, Civil Cases, U.S. Fifth Circuit.

COURT'S INSTRUCTION NO. 6

Admissions and Judicial Notice

During this trial, you have been informed that the defendants have admitted certain facts. You must accept any such admitted facts as conclusively established.

During this trial, you have also been informed that the Court has taken judicial notice of certain facts. You must also accept those facts as conclusively established.

[NOTE]

FED. R. CIV. P. 36(b).

FED. R. EVID. 201(g).

COURT'S INSTRUCTION NO. 7

Credibility of Witnesses

Now, I have said that you must consider all of the evidence. This does not mean, however, tht you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the plaintiff or to the defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

[NOTE]

4 BASIC PATTERN JURY INSTRUCTIONS, Civil Cases, U.S. Fifth Circuit.

COURT'S INSTRUCTION NO. 8

Impeachment

A witness may be discredited or "impeached' by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The fact that a witness has previously been convicted of a felony, or a crime involving dishonesty or false statement, is also a factor you may consider in weighing the credibility of that witness. The fact of such a conviction does not necessarily destroy the witness' credibility, but is one of the circumstances you may take into account in determining the weight to be given to his testimony.

COURT'S INSTRUCTION NO. 9

Expert Witnesses

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

[NOTE]

6 BASIC PATTERN JURY INSTRUCTIONS, Civil Cases, U.S. Fifth Circuit.

COURT'S INSTRUCTION NO. 10

In this case there has been a conflict in the testimony of expert witnesses. By considering and weighing the credibility and qualifications of the respective experts who have testified; the logic of the reasons given in support of their opinion; the other evidence in the case which favors or opposes a given opinion; and by using your own experience and good judgment as reasonable and intelligent people you must resolve that conflict and determine which of the opinions to accept as accurate.

[NOTE]

Standard Civil Jury Instructions for the District of Columbia 3-4.

COURT'S INSTRUCTION NO. 11

Direct and Circumstantial Evidence

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

[NOTE]

Local Boilerplate.

COURT'S INSTRUCTION NO. 12

Facts and Inferences

You are to consider only the evidence presented, and you may not guess or speculate as to the existence of any facts in this case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience. Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

[NOTE]

Local Boilerplate.

COURT'S INSTRUCTION NO. 13

Court Rulings

At times throughout the trial, the court has been called upon to pass on the admissibility of certain offered evidence. You should not be concerned with the court's rulings or the reasons for them. Whether evidence which has been offered is admissible or is not admissible is purely a question of law, and from a ruling on such a question you are not to draw any inference. In admitting evidence, to which an objection has been made, the court does not determine what weight should be given to such evidence. You must not guess what the answer might have been to any question to which an objection was sustained, and you must not speculate as to the reason the question was asked or the reason for the objection.

[NOTE]

Local Boilerplate.

COURT'S INSTRUCTION NO. 14

Weight of Testimony

After you have considered all of the factors bearing upon the credibility of a witness which I have mentioned to you, you may conclude to reject all of the testimony of a particular witness, none of the testimony of a particular witness, or part of the testimony of a particular witness. In other words, you may give the testimony of any witness such credibility and weight, if any, as you may think it deserves.

[NOTE]

Local Boilerplate.

COURT'S INSTRUCTION NO. 15

Number of Witnesses

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses, which does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence, which does produce such belief in your minds. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

[NOTE]

Local Boilerplate.

COURT'S INSTRUCTION NO. 16

§ 71.09 Stipulations

Thus, statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulates or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

COURT'S INSTRUCTION NO. 17

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his client because the attorney has made objections.

Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

When the Court has sustained an objection to a questions addressed to a witness the jury must disregard the question entirely, and may draw no inference from the wording of it, or speculate as to what the witness would have said if he had been permitted to answer any question.

[NOTE]

Devitt & Blackmar, *Federal Jury Practice and Instructions* (1977) § 70.15.

COURT'S INSTRUCTION NO. 18

The plaintiff has the burden of proving his case by a preponderance of the evidence as to each and every essential element of his claim against the defendant. This burden remains with the plaintiff throughout the trial. A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be provided is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

COURT'S INSTRUCTION NO. 19

Burden of Proof

Where more than one claim is involved, as in this case, you should consider each claim, and the evidence pertaining to it, separately, as you would had each claim been tried before you separately; but in determining any fact in issue you may consider the testimony of all of the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If a preponderance of the evidence does not support each essential element of a claim, then the jury should find against the party having the burden of proof as to that claim.

[NOTE]

7B BASIC PATTERN JURY INSTRUCTIONS, Civil Cases, U.S. Fifth Circuit.

COURT'S INSTRUCTION NO. 20

DEFENDANT LORILLARD'S PROPOSED JURY INSTRUCTION NO.—

You are instructed that you are not to give any consideration to the fact that the Court issued a preliminary injunction establishing a credit relationship between the parties pending suit. You are not to consider the issuance of the injunction as an expression by the Court of an opinion or finding on any issue in this case.

COURT'S INSTRUCTION NO. 21

(Summary of Claims and Defenses)

The plaintiff claims that it entered into an agreement with the defendant whereby the defendant promised to supply the plaintiff with its reasonable requirements for cigarettes and other related products, and that defendant breached that agreement by failing to fill an order dated January 31, 1986. Defendant alleges that there was no enforceable agreement between the parties, but that, even if there was, it did not breach that agreement.

Plaintiff also claims that the defendant engaged in price discrimination in violation of the federal statute known as the Robinson-Patman Act and the similar Maryland Antitrust Act. Under certain circumstances, these statutes prohibit a seller from selling goods of like grade and quality to different purchasers who compete with each other at different prices. However, the acts do not prohibit all price differences. In this case, plaintiff claims that defendant sold cigarettes and other items to plaintiff's competitors on better credit terms, and, therefore, at lower net prices, than those paid by the plaintiff.

Plaintiff also asserts tort claims for intentional interference with business relations and injurious falsehood. These claims relate to the alleged communications between the defendant's employees and other tobacco manufacturers that allegedly caused the other manufacturers to restrict the plaintiff's credit.

Besides denying that the plaintiff has met its burden of proof with respect to each and all of these claims, the defendant raises affirmative defenses to some of the claims. With respect to affirmative defenses, you need only consider such if you find that the plaintiff has met its burden of proof on a particular claim. The defendant has the burden of proof, by a preponderance of the evidence, with respect to any affirmative defense itself.

The defendant claims by way of defense, that there was no enforceable contract in writing as required by the law. I will explain this in more detail when I instruct you on that claim. If there was an enforceable contract, the defendant claims is that it acted reasonably in restricting the plaintiff's credit, and requiring cash in advance or a letter of credit, considering the circumstances surrounding the Paolella bankruptcy

With respect to the antitrust claims, the defendant raises the affirmative defense of meeting competition. I also will explain this further when I instruct you on those claims.

Finally, with respect to the claim of injurious falsehood, the defendant raises the affirmative defense of privilege.

COURT'S INSTRUCTION NO. 22

(Breach of Contract—Introduction)

In the first Count of the complaint, plaintiff alleges that Lorillard entered into a contract with plaintiff to sell cigarettes to the plaintiff and that Lorillard breached the terms of that contract. The plaintiff has the burden of proving by a preponderance of the evidenec both the existence and the terms of the contract. The cardinal contract term that is at issue is the term concerning credit. You must determine the parties intent as to the credit terms Mr. Kline was to receive and whether and under what circumstance and to what extent, Lorillard could change those credit terms from time to time.

A contract is an agreement between two or more parties creating right or obligations based on the promises in the agreement.

[NOTE]

[MPJI, Civils 9:1 (1984)].

COURT'S INSTRUCTION NO. 23

(Writing Requirement)

You are instructed that contracts of the type alleged to have been made and sought to be enforced by the plaintiff in this suit are required to be in writing to be enforceable. This writing need not be formal and can be anything in writing that identifies the parties to the agreement and at least the quantity term of the agreement. It must be signed by the party against whom it is sought to be enforced (in this case, the defendant). [MPJI, CIVIL: 9:8 (1984)].

The only writings at issue in this case is the letter dated January 15, 1986, sent to plaintiff by defendant. The parties disagree as to whether that letter contains a quantity term. It must contain a quantity term to satisfy the legal requirements for enforceability. The plaintiff alleges that the language "your request to purchase Lorillard products on a direct basis has been approved by our new accounts committee, and you have been added to our direct list of customers for Full Line as successor to W.B. Merrey & Sons, Inc." refers to an agreement to supply plaintiff with all the cigarettes it needs. This would be a quantity term called a requirements contract. What you must first decide is whether this language is sufficient to satisfy the requirement that the writing contain a quantity term.

You must decide what the quotation I just read you from the January 15, 1986 letter means. You are instructed that, if you find that the language was understood by the parties to constitute an agreement to supply plaintiff with its requirements, then that is sufficient to satisfy the quantity term requirement. It is not necessary that a particular numerical quantity be stated, only that the writing indicate that the quantity to be delivered under the contract is the party's requirements. [*Md. Comm. Law Code Ann.* § 2-306; *Cavalier Mobile Homes,* *Inc. v. Liberty Homes, Inc.*, 53 Md. App. 379, 395, —— A.2d ——, —— (1983)].

You are instructed that the terms "direct basis" and "direct list of customers for Full Line," as used in this letter, are terms used in the cigarette wholesaling business. If you should find that these terms, when used in a contractual arrangement for the supply of cigarettes to a wholesaler by a manufacturer, are generally understood by parties to constitute an agreement for the manufacturer to supply the wholesaler with its reasonable requirements, then the language in the letter sufficiently states a quantity term.

In deciding this issue, you may consider the prior course of dealing between the parties and any trade usage or customs in the tobacco products distribution business. [*Salmon Falls Manufacturing Co. v. Goddard*, 20 U.S. 276, 178 (1853); *Williams v. Woods*, 16 Md. 220, 251-52 (1860)].

A course of dealing is a sequence of previous conduct between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. [*Md. Comm. Law Code Ann.* § 1-205(1)].

A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade to justify an expectation that it will be observed with respect to the transaction in question. [*Id.* at § 1-205(2)].

You are instructed that, if you find, considering the prior dealings and trade usage, that the parties should have understood the language in question to establish a requirements quantity term, then the writing is sufficient as a matter of law.

You must also decide the extent of Lorillard's obligation under the contract to provide open credit, including whether Lorillard had the right to change open credit terms from time to time.

COURT'S INSTRUCTIONS NO. 24

(Estoppel)

If you find that the writing is insufficient, you still may find the agreement, if any, enforceable if you find that the plaintiff has proved by a preponderance of the evidence that the doctrine of estoppel applies to this case.

Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded from asserting rights that might perhaps have otherwise existed as against another person who has in good faith relied upon such conduct and has been led thereby to change his position for the worse. It is essential for the doctrine of estoppel that the party claiming the benefit of the estoppel must have been misled, however innocently, to his injury *and* changed his position for the worse, having believed and relied upon the representations of the party sought to be estopped. [*Dahl v. Brunswick Corp.*, 277 Md. 471, 487, —— A.2d ——, —— (1976), *cited with approval in Maryland Supreme Corporation v. The Blake Company*, 279 Md. 531, 549, — A.2d —, — (1977); *Kline v. Lightman*, 243 Md. 460, 474-75, 221 A.2d 675, — (1966); J. White & R. Summers, *Uniform Commercial Code*, § 2-6 (1980) (citing U.C.C. §§ 1-103, 2-203)].

COURT'S INSTRUCTION NO. 25

(Contract—Existence and Terms)

If you find that the writing is sufficient, or that the defendant is estopped from raising its insufficiency under the two instructions I just gave you, then you must determine whether the parties, in fact, entered into a contract whereby the defendant promised to supply the plaintiff with its reasonable requirements. In deciding whether there was an agreement and, if so, what its terms were, you may consider the writings, the parties' prior course of dealings, trade usage, the discussions between the parties and their representatives, and any other circumstances surrounding the negotiations. The burden is on the plaintiffs to prove, by a preponderance of the evidence, the validity and terms of the contract.

For a contract to be valid its essential terms must be sufficiently clear and certain so that the persons involved can understand their rights and duties. [MPJI, CIVIL: § 9:10 (1984)].

You are instructed that a contract is to be interpreted so as to give effect to the parties' intentions at the time it was made. If when the the contract was made one party knew or should have known that the other party interpreted the contract in a certain way and did not object to that interpretation, the contract is to be interpreted in that way. [MPJI, CIVIL: 9:23 (1984)].

COURT'S INSTRUCTION NO. 24A

(Commercial Good Faith)

If you find that under the terms of the contract Lorillard had the right to change credit terms, that right must have been exercised in good faith. Because Lorillard is a merchant, good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

[NOTE]

U.C.C. §§ 1-203, 2-103(1)(b).

COURT'S INSTRUCTION NO. 26

(Reasonable Requirements)

If you decide that the parties entered into a contract whereby the defendant agreed to supply the plaintiff with its reasonable requirements, you then must decide whether the plaintiff's January 31, 1986 order was in good faith and within reasonably forseeable limits of the requirements estimated by the parties at the time of contract. If it was, then defendant's failure to ship on open credit was a breach of contract, unless Lorillard had the contract right to change the open credit terms and did so in good faith.

You are instructed that, in a requirements contract, no quantity unreasonably disproportionate to any stated estimate, or in the absence of any stated estimate to any normal or otherwise comparable prior requirements, may be demanded. Reasonable elasticity in, and good faith variations from, prior requirements are permitted, as long as the requirements approximate a reasonably forseeable figure. [*Md. Comm. Law Code Ann.* § 2-306(1) and Official Comment 2 thereto].

If you find that the plaintiff's January 31, 1986 order was unreasonably disproportionate, then the plaintiff may not recover damages for the defendant's failure to fill it, because such failure would not be a breach of the parties' contract. As with the burden of establishing the existence and terms of the contract, the burden is on the plaintiff to show that the January 31, 1986 order was not unreasonably disproportionate.

Good faith here has the same meaning I just instructed you on.

COURT'S INSTRUCTION NO. 27

(Right to Adequate Assurance of Performance)

If you find that the plaintiff's order of January 31, 1986 was not unreasonably disproportionate, you next must consider whether the circumstances surrounding the events of early 1986 were sufficient to warrant the actions taken by the defendant regarding the payment (and credit) terms extended plaintiff.

In that regard, you are instructed that when reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return. After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract. [*Md. Comm. Law Code Ann.* § 2-609(1), (4)].

This requires consideration of four questions:

1. Was the defendant given reasonable grounds for insecurity?

2. Did the defendant make a demand in writing?

3. Was the assurance demanded reasonable in light of the circumstances?

4. Did the plaintiff within a reasonable time offer adequate assurance of future performance?

In evaluating these questions you are instructed that between merchants, as in this case, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards, as applied to the contract in question and the circumstances of the case. [*Id.* at Official Comment 3].

In this instance, the burden is on the defendant to prove that, in light of commercial standards of the business, the occurrences of early 1986 were sufficient to create reasonable grounds for the defendant to be insecure as to whether the plaintiff would fulfill its obligations of payment under the contract. It is also the defendant's burden to show that the defendant made a demand in writing upon the plaintiff for assurance that the plaintiff would fulfill its end of the bargain, and that the assurances sought were reasonable in light of the circumstances. If you do not find that the defendant has proved these elements by a preponderance of the evidence, and if you find that the contract was valid and the plaintiff's January 31, 1986 order was reasonable, then you must find that the defendant breached the contract. If the defendant proves these things by a preponderance of the evidence, the burden then shifts to the plaintiff to prove, by a preponderance of the evidence, that it provided within a reasonable time, not exceeding thirty days, such assurance as was adequate under the circumstances, considering the commercial standards of the business. If you find that the plaintiff had a duty to provide such assurances because defendant had reasonable grounds for insecurity and made a written demand for reasonable assurances, and the plaintiff failed to provide such assurances, then you must find that the plaintiff repudiated the contract, and it may not recover under its claim for breach of contract.

COURT'S INSTRUCTION NO. 28

(Contract Damages)

If you find that the defendant breached the contract, you must consider the damages, if any, to which the plaintiff is entitled. The burden is on the plaintiff to prove by the preponderance of the evidence each item of damage it claims was caused by the defendant. In considering damages, you must keep in mind that your award must adequately and fairly compensate the plaintiff, but your award should not be based on guesswork. [MPJI, CIVIL: 10:1 (1984)].

The plaintiff is entitled to be placed in the same situation as if the contract had not been broken. Its damages are the profits it would have made had the contract been performed. These damages are arrived at after deducting the amount that it would have cost the plaintiff to have performed the contract. [MPJI, CIVIL: 10:13 (1984)].

You are instructed that, in computing the plaintiff's damages, if any, you are to include any loss resulting from the general or particular requirements and needs of which the defendant had reason to know at the time of contracting and which the plaintiff could not reasonably prevent. [*Md. Comm. Law Code Ann.* § 2-715(2)(a)].

You also are instructed that a party has the duty to try to lessen the damages it may suffer as a result of what another party does. A party may not recover for any damage that it could have avoided by making a reasonable effort without risk of additional substantial loss or injury. [MPJI, CIVIL: 10:11 (1984)].

COURT'S INSTRUCTION NO. 29

(Robinson-Patman Act)

Plaintiff also claims that the defendant engaged in price discrimination in violation of the federal statute known as the Robinson-Patman Act and the similar Maryland Antitrust Act. Under certain circumstances, these statutes prohibit a seller from selling goods of like grade and quality to different purchasers who compete with each other at different prices. However, the acts do not prohibit all price differences. In this case, plaintiff claims that defendant sold cigarettes and other items to plaintiff's competitors on better credit terms, and, therefore, at lower net prices, than those paid by the plaintiff.

To prevail on these claims, the plaintiff must prove by a preponderance of the evidence the following elements:

1. That the products involved in the sales being compared were of like grade and quality; *admitted*

2. That the defendant charged discriminatory—that is, different—prices to different purchasers in actual sales transactions;[2]

3. That there is a reasonable possibility that the discriminatory pricing may harm competition;[3] and

4. That the plaintiff was injured in his business or property because of the discriminatory pricing. If you find that the evidence is insufficient to prove any one or more of these elements by a preponderance of the evidence, then you must find for the defendant on these claims.

[NOTE]

[1] *FTC v. Borden Co.*, 383 U.S. 637 (1966).

[2] *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

[3] *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 738 (1945).

[4] *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981).

COURT'S INSTRUCTION NO. 30

(Price Discrimination—Defined)

Price discrimination means selling goods to one purchaser at a price that is different from that charged another purchaser.[1] The plaintiff, therefore, must prove that the defendant charged it a different price than defendant charged other purchasers. In determining whether prices are different, you must determine the actual net prices paid by the purchasers.[2] This means you must take into account any rebates, allowances, discounts or other terms or conditions of sale that may alter the net price actually paid. In this case, plaintiff claims that the other purchasers received a lower price because they were given credit terms that were not available to plaintiff.

A difference in credit terms that is based on legitimate credit-granting criteria, such as the borrower's financial strength, business experience, credit history, net worth, capital, cash position, personal guaranty, and business success, however, does not constitute price discrimination.[3]

If the plaintiff has not proved that the defendant gave other purchasers favorable credit terms that were not available to the plaintiff and that were not based on legitimate business reasons, then you must return a verdict for the defendant.

[NOTE]

[1] *Corn Products*, 324 U.S. at 740; *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 729 F.2d 676, 682 (10th Cir.), *cert. denied*, 105 S. Ct. 178 (1984).

[2] *Corn Products*, 324 U.S. at 740.

[3] *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1325-26 (6th Cir. 1983); *Craig v. Sun Oil Co.*, 515 F.2d 221 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976).

COURT'S INSTRUCTION NO. 31

SELLER LIABILITY—§ 2(a)

Instruction 10

Competitive Injury—Secondary and Tertiary Line [1]

In order to establish a reasonable possibility of harm to competition, plaintiff must prove a substantial difference in price in sales by defendant to plaintiff and to other competing purchasers over a significant period of time.[2] This inference of competitive injury may be overcome or rebutted if you find that defendant showed that any lost sales or profits were not caused by the price differential. Defendant claims that any loss of sales or profits by plaintiff resulted from [*set out alleged factors.*]. If, however, you find that plaintiff actually lost significant profits or sales as a result of the alleged price discrimination, then competition has been harmed to that extent.[3]

If after considering the foregoing matters, you find that there is a reasonable possibility that defendant's alleged discriminatory pricing may have harmed competition, then you must find that plaintiff has established this element of its Robinson-Patman Act claim. If you find that the alleged discrimination did not have such an effect, then you must find that defendant did not violate Section 2(a) and you must therefore find for defendant and against plaintiff on this claim.

[NOTE]

[3] *See, Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (1982); *Dairy King, Inc. v. Kraft, Inc.*, 645 F. Supp. 126, 130 (D. Md. 1986).

COURT'S INSTRUCTION NO. 32

(Substantial v. *De Minimis* Difference)

In order for the inference of competitive injury to arise, the price discrimination must not be insubstantial or *de minimis.*[1] Whether a particular price difference is substantial depends on the business in question. The level of competition and the profit margins in the industry are factors to be considered in determining whether a price difference is substantial.[2]

[NOTE]

[1] *Kohner v. Wechsler,* 477 F.2d 666 (2d Cir. 1973); *Petroleum for Contractors, Inc. v. Mobil Oil Corp.,* 493 F. Supp. 320, 326 (S.D.N.Y. 1980).

[2] 5 J. von Kolinowski, *Antitrust Laws and Trade Regulation* § 31.01[4][e] at 31-38 and cases cited at n. 108 (1987).

COURT'S INSTRUCTION NO. 33

SELLER LIABILITY—§ 2(a)

Instruction 11

Meeting Competition Defense

Defendant has raised the "meeting competition" defense. This defense permits a seller to offer discriminatory prices if done for the purpose of meeting a competitor's price.

In order to win on this defense, defendant must prove that it acted under circumstances that would lead a reasonable and prudent businessman to believe in good faith that the granting of a lower price would meet the equally low price of a competitor.[1] Here, defendant claims that the prices it charged to [*Customer A, or to a class of favored buyers*] were necessary to meet the equally low prices offered by [*Competitor X*]. Defendant does not have to establish with absolute certainty that it was meeting the lower prices being offered by [*Competitor X*]. The law does not require that defendant have actually verified the lower price available to [*Customer A*] or that it have actually identified the specific competitor offering the lower price. In fact, the law normally does not permit a seller to contact its competitor to verify price quotations.[2]

Defendant's lower price must be reasonably tailored to the competitive situation facing it. Thus, defendant must limit its lower price to that group of customers believed to have the lower price available to it from [*Competitor X*].[3] Similarly, defendant's lower price may continue only as long as the competitive circumstances justifying it, as reasonably known to defendant, continue.[4]

Defendant is entitled to offer a lower price in order to meet a competitor's price, but not for the purpose of undercutting that price. If defendant does not have knowledge of the competitor's price, defendant is entitled to act on the information available to it on good faith investigation. Defendant must prove that it acted in good faith to match, not undercut, its competitor's price based on the information available to it when its price was offered.[5, 6]

[Plaintiff contends that when defendant met Competitor X's lower price it knew that the price Competitor X was charging was itself unlawful (describe reason for unlawfulness). If plaintiff proves by a preponderance of the evidence that defendant knew that the price it was meeting was unlawful, then defendant cannot win on the meeting competition defense.] [7]

If you find that defendant acted in good faith to meet [*Competitor X's*] equally low [*and lawful*] price, then you must return a verdict for defendant on plaintiff's Robinson-Patman Act claim. If defendant has not proven it acted in good faith to meet competition, you must reject this particular defense.

NOTES

[1] 15 U.S.C. § 13(b); *Falls City*, 460 U.S. at 451; *United States v. United States Gypsum Co.*, 438 U.S. 422, 451 (1978) ("*Gypsum*"); *FTC v. A.E. Staley Manufacturing Co.*, 324 U.S. 746, 759-60 (1945). In *Falls City*, the Supreme Court said that a seller could take advantage of the meeting competition defense even if it did not *lower* its price to meet competition, so long as the lower price was made in good faith to meet a competitor's equally low price. "Thus, a price discrimination created by selective price increases can result from a good-faith effort to meet a competitor's low price." 460 U.S. at 444.

[2] *Gypsum*, 438 U.S. at 453-54.

[3] *Falls City* rejected the customer-by-customer response argument and said the lower price could be offered to numerous buyers or on an area-wide basis. 460 U.S. at 447-50.

[4] *Id.* at 450.

[5] *Id.* at 448-49. The meeting competition defense is available to a seller who meets a competitor's price in order to gain a new customer, as well as to retain an old one. *Id.* at 446-47.

[6] Some of the factors the jury may consider in evaluating a defendant's good faith in matching a competitor's offer are the following:

(a) Whether defendant received reports of similar discounts from other customers;

(b) Whether defendant was threatened with losing a sale if the discount was not met;

COURT'S INSTRUCTION NO. 34

CLAYTON ACT § 4 REQUIREMENTS

Instruction 1

Injury and Causation

If you find that defendant has violated [*the Robinson-Patman*] Act as alleged by plaintiff, then you must decide if plaintiff is entitled to recover damages from defendant.

The law provides that anyone who is injured by an antitrust violation may recover damages for any injury to its business or property caused by the violation.[1]

In order for plaintiff to establish that it is entitled to recover damages, it must prove that it was injured as a result of defendan't alleged violation of the antitrust laws. This is sometimes referred to as proving "causation" or "fact of damage."[2] Proving causation does not require plaintiff to prove the dollar value of its injury. It requires only that plaintiff prove that it was in fact injured by defendant's alleged antitrust violation. If you find that plaintiff has established that it was in fact injured, you may then consider the amount of plaintiff's damages. It is important to understand, however, that injury and amount of damage are different concepts and that you cannot consider the amount of damage unless and until you have concluded that plaintiff has established that it was in fact injured.[3]

To establish injury, plaintiff must have offered evidence which establishes as a matter of fact and with a fair degree of certainty[4] that defendant's alleged illegal conduct was a material cause of plaintiff's injury. This means that plaintiff must have proved that some damage flowed to it as a result of defendant's alleged antitrust violation.[5] Plaintiff is not required to prove that defendant's alleged antitrust violation was the sole cause of its injury; nor need plaintiff eliminate all other possible causes of injury to establish causation. It is enough if plaintiff has proved that the alleged antitrust violation was a material cause of its injury.[6] However, if you find that plaintiff's injury was caused by something other than the alleged antitrust violation, then you must find that plaintiff has failed to prove that it is entitled to recover damages from defendant.[7]

NOTES

[1] 15 U.S.C. § 15 (1984); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 143-44 (1968) (White, J., concurring); *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1564 (5th Cir. 1984) (en banc), *cert. denied,* —— U.S. ——, 106 S. Ct. 788 (1986); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785, 828 n.49 (2d Cir. 1983), *cert. denied,* 464 U.S. 1073 (1984); *McClure v. Undersea Industries, Inc.*, 671 F.2d 1287, 1289 (11th Cir. 1982), *cert. denied,* 460 U.S. 1037 (1983); *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 268 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 928 (1982); *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied,* 454 U.S. 897 (1981).

COURT'S INSTRUCTION NO. 35

CLAYTON ACT § 4 REQUIREMENTS

Instruction 2

Business of Property [1]

Plaintiff must also establish that the injury which it claims to have suffered was an injury to its "business or property" if it is to recover damages. The term "business" includes any commercial interest or venture and you are instructed that plaintiff has been injured in its "business" if you find that it has suffered injury to any of its commercial interests or enterprises as a result of defendant's alleged antitrust violation.[2] The term "property" includes anything of value which plaintiff owns or possesses. You are instructed that plaintiff has been injured in its "property" if you find that anything of value which it owns or possesses has been damaged as a result of defendant's alleged antitrust violation. You are further instructed that plaintiff has been injured in its "property" if you find that it has paid an inflated price for goods or services or has lost money as a result of defendant's alleged antitrust violation.[3]

NOTES

[1] This instruction is included for those few cases where an issue of fact arises as to whether the plaintiff's injury qualifies as an injury to its business or property.

[2] *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972); *Farnell v. Albuquerque Publishing Co.*, 589 F.2d 497, 500 (10th Cir. 1978).

COURT'S INSTRUCTION NO. 36

DAMAGES

Instruction 1

Amount and Certainty

If you find that plaintiff has been injured by an antitrust violation committed by defendant, the law provides that plaintiff should be fairly compensated for all damages to its business and property which were a direct result or likely consequence of the conduct which you have found to be unlawful. A defendant's violations of the antitrust laws often create a situation in which it is hard to determine the precise amount of damages suffered by the plaintiff. Plaintiff's right to be fairly compensated should not be affected by any difficulty you may have in determining the precise amount of the recovery so long as there is a reasonable basis in the evidence for your award. You may not, however, calculate damages based only on speculation or guesswork, and you must remember that you can award plaintiff damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors.

COURT'S INSTRUCTION NO. 37

DAMAGES

Instruction 2

Calculation—Introduction

If you find that defendant violated the antitrust laws and that this violation caused injury to plaintiff, then you must determine the amount of damages, if any, plaintiff is entitled to recover.

NOTE

The instructions that follow are intended to guide the jury in calculating damages in specific cases. The parties and the court are encouraged to modify these instructions to fit the specific damage theories at issue in each case.

COURT'S INSTRUCTION NO. 38

DAMAGES

Instruction 3

Lost Profits

Plaintiff is entitled to recover any profits it lost as a result of an antitrust violation caused by defendant. Profit in this sense is net profit, and simply means the amount by which plaintiff's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues.

[*Before-After Measure*] In determining the amount of any loss of profits by plaintiff, you are entitled to compare plaintiff's actual net profits in a period before the alleged antitrust violation with its actual net profits, or loss, thereafter, so long as you find that the earlier operating experience provides a reliable guide for estimating what plaintiff's actual experience would have been in the absence of the alleged antitrust violation.

[*Yardstick Measure*] In determining the amount of any loss of profits by plaintiff, you are entitled to compare the actual profit performance of plaintiff with the profit performance of comparable businesses which were not affected by the alleged unlawful conduct of defendant. In order for this to be a reasonable basis for determining plaintiff's loss of profits, if any, you must find that the other businesses whose performance is compared to plaintiff's business are generally comparable or similar to plaintiff's business, aside from the effect of the alleged violation of the antitrust laws.

[*Market Share Measure*] In determining the amount of any loss of profits by plaintiff, you are entitled to consider evidence relating to the market share that plaintiff would have had but for the alleged violation of the antitrust laws and to calculate the amount of profit plaintiff would have earned had it not been for the alleged antitrust violation, based on that market share, evidence of the size of the market, and evidence relating to the profit margin plaintiff would have secured on such sales.

NOTE

This instruction outlines three common measures of lost profits. The instructions as to the specific measures of lost profits should be tailored to the specific facts and damage theories of each case, and it is contemplated that this instruction will provide only the elementary frame for a lost profits instruction in a specific case. The "before-after" and "yardstick" measures of lost profits are similar in that both compare the plaintiff's results during the period of the alleged violation with the results of a comparable business—the plaintiff's in the "before-after" model and usually some other business in the "yardstick" model—to determine the effect of the alleged violation on plaintiff's profits. Both measures of damages were approved in *Bigelow v. RKO Radio Pictures,* 327 U.S. 251 (1946). The yardstick measure was also approved in *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709 (9th Cir. 1959), *cert. denied,* 361 U.S. 961 (1960). In appropriate cases the two methods may be combined, provided they do not duplicate each other. For example, the before-after measure may be used to project lost sales, while the yardstick measure may be used to project expenses. *See, e.g., Lehrman v. Gulf Oil Corp.,* 500 F.2d 659 (5th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975).

COURT'S INSTRUCTION NO. 39

DAMAGES

Instruction 4

Future Lost Profits

In this case, plaintiff seeks damages for future lost profits. If you find that defendant's alleged antitrust violation has caused plaintiff to lose profits it could otherwise reasonably expect to earn in the future, you may award plaintiff damages for those future lost profits. [*You have already been instructed on the method you may use to calculate plaintiff's lost profits, if any, and you should use that same method to calculate plaintiff's future lost profits, if any.*]

Plaintiff has presented evidence that, had it not been for defendant's alleged antitrust violation, it would have earned certain profits for 5 years into the future. In evaluating this claim for future lost profits, you must make a just and reasonable estimate of both the amount of profits, if any, plaintiff would have earned in future years and the length of time it would have earned those profits. For example, you should consider the various uncertainties that could affect the future success of plaintiff's business, such as general market conditions, competition plaintiff would face in the future, and the like. You may also consider whether it is reasonable to project the stream of profit into the future for a period of years as plaintiff has done in this case. In other words, if you find that plaintiff is entitled to some award of damages for future lost profits, you must consider all of the evidence presented to you concerning those future or anticipated profits, and award what you consider to be a reasonable estimate of those lost future profits.

If you make an award of damages to plaintiff that includes profits you find plaintiff would have made in the future but for the alleged antitrust violation, the amount of profits which would be made after the date of your verdict must be discounted to its present value at a rate of interest which you find reasonable. This is because the right to receive a certain sum of money at a future date is worth less than the same amount of money in hand today. For example, if you receive $100 today which you would otherwise not receive until a year from now, you can invest that $100 so that a year from now, interest on that $100 investment will make it worth something more than $100.

NOTE

Lost future profits will be an issue when plaintiff has been eliminated from a market because of the alleged antitrust violation or when the alleged antitrust violation has continuing effects on plaintiff's business. Where the plaintiff continues in business and injunctive relief is to be granted, the trial court must take appropriate care to assure that the plaintiff is not awarded a recovery duplicating the benefits of the injunctive relief. *Los Angeles Memorial Coliseum Commission v. National Football League*, 791 F.2d 1356 (9th Cir. 1986). Although this instruction assumes that the same method for calculating past profits lost will be used for calculating future lost profits, this is not necessarily the case, and the second sentence of the first paragraph may therefore require change.

COURT'S INSTRUCTION NO. 40

DAMAGES

Instruction 6

Preparedness to Enter Business

In this case, plaintiff claims that defendant's alleged antitrust violation prevented it from expanding his business. It is not necessary that plaintiff have actually entered into this business to recover damages, if you find that defendant's alleged antitrust violation prevented plaintiff entering into this business. Plaintiff must prove, however, that it had an intention to enter into this business and that it had taken some steps to prepare to do so.

In determining whether or not plaintiff has demonstrated the intention and preparedness to engage in this new business, you may consider such elements as the following: The background and experience of the principals and employees of plaintiff; the ability of plaintiff to finance the business and to purchase the necessary facilities and equipment; affirmative steps taken by plaintiff to enter into their new business; and so forth. Ultimately, in order to award plaintiff damages related to its failure to enter this business, you must determine that had it not been for defendant's alleged antitrust violation, plaintiff would have entered that business.

COURT'S INSTRUCTION NO. 41

DAMAGES

Instruction 7

Mitigation

Plaintiff may not recover damages for any portion of its injury which plaintiff could have avoided through the exercise of reasonable care and prudence. The law requires an injured party to take all reasonable steps that it can to avoid further injury and thereby reduce its loss. If a plaintiff fails to take reasonable steps available to it, and the failure to take those steps results in greater harm to the plaintiff than the plaintiff would have suffered had it taken those steps, the plaintiff may not recover damages for injury which it would have avoided if it had taken reasonable actions that would have reduced its injury.

In determining whether plaintiff failed to take reasonable measures to limit its damages, you must remember that the law requires plaintiff to use only those measures which are reasonably practicable under the circumstances. In determining whether plaintiff's conduct was reasonable, you should take into account the evidence concerning the circumstances as they appeared to plaintiff at the time, rather than in hindsight. Plaintiff is given a wide latitude in deciding how to handle the situation, so long as what plaintiff did was not unreasonable in light of the existing circumstances.

The burden of proof on this issue is on defendant. Defendant must prove by a preponderance of the evidence that plaintiff acted unreasonably in failing to take specific steps to minimize or limit its losses, that the failure to take those specific steps resulted in its losses being greater than they would have been had it taken such steps, and the amount by which plaintiff's loss would have been reduced had plaintiff taken those steps.

NOTE

The obligation to mitigate damages in an antitrust case is clear. *See, e.g., Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 436 (5th Cir. 1977). The burden of proof is on the defendant, and is satisfied only if defendant proves that the plaintiff's conduct was unreasonable and aggravated plaintiff's harm. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 863 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981).

COURT'S INSTRUCTION NO. 42

MPJI 10:17 CHAPTER TEN

MPJI 10:17

DAMAGE AWARD NOT SUBJECT TO FEDERAL OR STATE INCOME TAX

Any damages awarded to the plaintiff are not income within the meaning of Federal and Maryland income tax laws and the plaintiff will not owe or have to pay any income tax on the amount awarded as damages.

COURT'S INSTRUCTION NO. 43

Duty to Deliberate

Of course, the fact that I have given you instructions concerning the issue of plaintiff's damages should not be interpreted in any way as an indication that I believe that plaintiffs should, or should not, prevail in this case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

[NOTE]

8A Basic Pattern Jury Instructions, Civil Cases, U.S. Fifth Circuit.

COURT'S INSTRUCTION NO. 44

Verdict Forms

After retiring to the jury room, your foreman who will preside over your deliberations, will be your spokesman here in court. A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

[NOTE]

9 BASIC PATTERN JURY INSTRUCTIONS, Civil Cases, U.S. Fifth Circuit.

COURT'S INSTRUCTION NO. 45

Reaching Verdict

In conclusion, let me remind you that your verdict must be unanimous, reflecting the judgment of each and every one of you. You should approach the issues of this case as men and women of affairs in the manner in which you would approach any important matter that you have occasion to determine in the course of your everyday business. Consider it in the jury room deliberately and carefully, in the light of the instructions which I have given you, and use the same common sense and the same intelligence that you would employ in determining any important matter that you have to decide in the course of your own affairs.

[NOTE]

Local Boilerplate.

No. 89-943 (3)

Supreme Court, U.S.
FILED
JAN 16 1990
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THOMAS J. KLINE, INC.,
Petitioner,
v.
LORILLARD, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

No. 89-943

THOMAS J. KLINE, INC.,
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Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Lorillard, Inc.[1] ("Lorillard"), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 878 F.2d 791.

QUESTIONS PRESENTED

1. Whether a decision of the Lorillard credit department to require petitioner to post a letter of credit amounted to price discrimination in violation of the Robinson-Patman Act.

2. Whether petitioner's claim of a requirements contract to sell on credit was sufficiently supported, to satisfy the Statute of Frauds, by a letter which simply authorized petitioner to purchase on a direct basis and set out Lorillard's current prices and payment terms.

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[1] Lorillard, Inc. is a wholly owned subsidiary of Loews Corporation. P. Lorillard International, S.A. is a subsidiary of Lorillard, Inc. Loew's Lorillard International Services, S.A. and Lorillard Italy, S.P.A. are subsidiaries of Lorillard, Inc. in the process of dissolution.

STATEMENT OF THE CASE

Petitioner is a corporation controlled by its namesake, Thomas J. Kline ("Kline"). From 1977 to 1980 Kline controlled Wm. B. Merrey & Sons, Inc. ("Merrey"), an Elkton, Maryland tobacco distributor. In 1980 he sold Merrey to M. Paolella & Sons, Inc. ("Paolella"), a Philadelphia tobacco distributor, managed it for Paolella, and then repurchased the business through petitioner in December 1985.

When Merrey was acquired by Paolella, it was operating under credit limitations imposed by the Lorillard credit department because of late payment problems, and related issues. Under the aegis of Paolella, payments for Lorillard products shipped to Merrey were handled directly by Paolella.

At the end of January 1986, about a month after Kline's reacquisition of the Merrey business, Paolella closed down and went into bankruptcy, causing substantial losses to its cigarette suppliers, including Lorillard. These losses were in major part attributable to the assertion of liens by Maryland National Industrial Finance Corporation ("MNIF"), which had financed Paolella, and which also financed both the asset purchase and subsequent operations of petitioner, with similar all embracing first liens on the inventory and other assets of petitioner.

At the outset of petitioner's business in the latter part of December 1985, the Lorillard credit department approved credit for petitioner up to a limit of $30,000, even though the only available financial statement was a "pro forma," and petitioner acknowledged a thin capitalization. It was expected that each shipment would be paid for within 15 days in order to gain the benefit of a 3.25% discount.

Shortly after the Paolella bankruptcy, and after Lorillard's discovery of a transshipment of inventory from a Paolella affiliate to petitioner, petitioner submitted an unusually large $30,000 order. This order was inconsistent with its original business plan, and with its prior ordering practice, and would have raised petitioner's indebtedness from $38,000 to $68,000. Lorillard's credit department reacted by insisting on a letter of credit to back up any future credit, and a $60,000 letter of credit was then supplied by MNIF.[2]

There was no evidence that this reflected anything but a *bona fide* credit decision on the part of Lorillard's credit department.

On March 31, 1986, this action was commenced, based primarily on a claimed contract to grant credit, in the Circuit Court of Maryland for Cecil County, and a temporary restraining order was entered followed by a preliminary injunction, which in net effect compelled Lorillard to extend credit up to $120,000 with only a $60,000 letter of credit. After removal of the action to the District Court for the District of Maryland, petitioner added the charge that the denial of credit amounted to price discrimination in violation of the Robinson-Patman Act.

The only documentation of the alleged contractual obligation of Lorillard to petitioner was a letter of January 15, 1986:

> "Dear Mr. Kline
>
> We are pleased to inform you that your request to purchase Lorillard products on a direct basis has been approved by our New Accounts Committee, and you have been added to our direct list of customers for Full Line as successor to W.B. Merrey & Sons, Inc.
>
> Our terms are:

REGULAR TERMS:	2% cash discount on invoices if payment is mailed no later than the 15th day after invoice date.
ANTICIPATORY DISCOUNT:	1.25% cash discount (total discount 3.25%) is available if payment is RECEIVED at our remittance address no later than the 15th day after invoice date.

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[2] An original demand for cash payments was promptly modified into a letter of credit arrangement. For about a month a problem in transmission of the letter of credit resulted in payment by wire transfers, through MNIF.

Enclosed is our price list No. 61, dated July 22, 1985 with supplements."

Kline testified in conclusory fashion, based on his "experience in the industry and . . . prior dealings with Lorillard," that he was entitled to purchase all of his requirements on 15 day terms. The only foundation for this was his assertion that Lorillard and the other cigarette manufacturers had always sold him all he ordered, on credit. Aside from the *non sequitur* of inferring a requirements contract from a vendor's past willingness to sell on credit, the assertion turned out to be untrue.[3]

The antitrust discrimination claim was based on the testimony of Lilly Ann Gordon, an "expert" who had no experience in the credit management field.

She compared petitioner's credit file with those of some other companies, notably Park Jensen, and concluded that petitioner was equally worthy of credit. In doing so, she made nothing of the inconsistency between the pro forma statement and the size of petitioner's order, treated petitioner's predictive pro forma as the equivalent of Park Jensen's audited statements, and ignored Kline's troubling connection with Paolella. She simply brushed aside the fact that Park Jensen also was required to post a letter of credit. The factual matrix of Lorillard's credit decision is discussed by the Court of Appeals at App. 15a-16a, and largely ignored in the petition.

The interest cost to petitioner of cash payment to Lorillard for one month was about $500, and the cost of maintaining a $60,000 letter of credit thereafter was about $190 per month. Ms. Gordon and an accountant, as experts, supported a theory of lost profits in an amount of $1,526,733 based on a series of extrapolations from inflated earnings in February 1986, when petitioner was filling the orders that had been placed with the defunct Paolella.

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[3] The corporate petitioner, having been formed for the reacquisition of the Merrey business, had no credit history of its own. Kline as the owner of Merrey had been, as noted, subjected to special credit limits by Lorillard before he sold Merrey to Paolella. And other tobacco companies were also, independently, limiting credit to petitioner.

The jury then awarded a judgment of $1,000,000 on the contract claim and $526,733 on the antitrust claim. This was obviously self-contradictory since the damage claim was the same for both causes of action. The District Court dealt with this problem by treating the $1,000,000 as a compensatory award and doubling the antitrust award as "punitive," thus entering a total final judgment of $2,053,466 plus interest, attorneys' fees and costs.[4]

The Fourth Circuit Panel, comprised of Judges Winter, Sprouse and Chapman, reversed the decision of the District Court. The Court of Appeals held that petitioner's expert did not possess the minimum qualifications necessary to support her opinions regarding a Robinson-Patman violation, and that no authority existed for the claim of a Robinson-Patman violation on the facts presented. The Court held further that the contract claim was barred by the Maryland Statute of Frauds.

In a dissenting opinion, Judge Sprouse disputed the majority's reversal but would have remanded because the damage calculation on both the contract and antitrust claims was insufficiently supported by the evidence, an issue not reached by the majority.

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[4] The District Court also issued an order permanently enjoining and restraining Lorillard from unlawfully discriminating in price, including credit terms, against petitioner in any manner prohibited by the Robinson-Patman Act. The petition (p.8) goes beyond the record to assert that "Kline's business failed following vacation of the permanent injunction." The *propter hoc* implication is indefensible. Petitioner closed down before there was any modification of Lorillard credit arrangements. Petitioner did not pay its debt to Lorillard, and Lorillard suffered a loss which was modest only because the letter of credit permitted by the original injunction remained as a buffer.

REASONS FOR DENYING THE WRIT

1. The Fourth Circuit Applied The Proper Standard — The Same Standard Applied By The Other Courts of Appeal — In Holding That The Refusal To Extend Credit Was Not A Violation Of The Robinson-Patman Act

The Fourth Circuit's decision on the Robinson-Patman claim, far from creating a conflict among the circuits or departure from Supreme Court precedent, aligns squarely with existing case law. Prior to this case, only the Sixth and Tenth Circuits had considered whether a determination as to credit worthiness can constitute a violation of the Robinson-Patman Act.[5] *See Bouldis v. United States Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir. 1983); *Craig v. Sun Oil Co.*, 515 F.2d 221 (10th Cir. 1975), *cert. denied,* 429 U.S. 829 (1976). Both courts reached the same conclusion: A legitimate credit decision is not actionable under the antitrust laws. *See Bouldis,* 711 F.2d at 1325; *Craig,* 515 F.2d at 224. A host of lower courts agrees.[6]

The Fourth Circuit expressly adopted the reasoning of the Sixth and Tenth Circuits, finding as they did that " 'differences in the borrower's financial strength, business experience, and many other factors bring about differences in the terms of credit.' " App. 11a, citing *Craig,* 515 F.2d at 224. In other words, decisions as to credit worthiness are bound to create differences in that some borrowers will fail to meet the lender's standards, but that is not the price discrimination which the Robinson-Patman Act was designed to prevent.

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[5] The Ninth Circuit noted the Tenth Circuit's holding but did not decide whether it applied. *See Foremost Pro Color, Inc. v. Eastmak Kodak Co.*, 703 F.2d 534, 537 (9th Cir. 1983), *cert. denied,* 465 U.S. 1038 (1984).

[6] *See, e.g., General United Co. v. American Honda Motor Co.*, 618 F. Supp. 1452, 1455-56 (W.D.N.C. 1985); *L.S. Amster & Co. v. McNeil Laboratories, Inc.*, 504 F. Supp 617, 620-22 (S.D.N.Y. 1980); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 502 F. Supp. 637, 647-48 (D.N.J. 1980); *Petroleum for Contractors, Inc. v. Mobil Oil Corp.*, 493 F. Supp. 320, 326-28 (S.D.N.Y. 1980); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F. Supp. 110, 122 (E.D.N.Y. 1976); *Lang's Bowlarama, Inc. v. AMF Inc.*, 377 F. Supp. 405, 408-09 (D.R.I. 1974).

None of the circuits — including the Fourth — has gone so far as to suggest that there can not be a factual situation so egregious that it raises the possibility of price discrimination. The *Craig* court warned: "We do not say that there could not be a discrimination in credit of such magnitude or nature as to constitute a violation, but no such extreme situation was alleged here by any means." 515 F.2d at 224. The Fourth Circuit adopted this approach in full, *see* App. 15a, but found nothing in the facts of this case to warrant submitting the issue to a jury, *see id.*

In the face of this seamless consistency in the caselaw, petitioner has tried to manufacture a conflict out of thin air in order to capture this Court's attention. Petitioner claims, for instance, that the Fourth Circuit's ruling contradicts Supreme Court precedent, citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). That case, however, did not involve a price discrimination claim under the Robinson-Patman Act; nor did it involve an individual credit decision. In *Catalano,* beer distributors had conspired to discontinue allowing short term credit to their retailers across the board. The arrangement had nothing to do with individual credit criteria; in fact, the beer distributors' action was a thinly disguised price increase. This Court found defendants' conspiracy to be a classic horizontal agreement to fix prices and thus a *per se* violation of the Sherman Act, Section 1. *See* 446 U.S. at 648.

Lorillard does not dispute the point made by *Catalano* — that the extension or denial of credit can have an effect on cost. It is a remarkable leap of logic, however, from that obvious concept to the position urged by Kline — that a seller may not deny credit to any customer based on concerns about that customer's credit worthiness, so long as it continues to extend credit to other customers. Under Kline's proposed scenario, a seller would be forced in doubtful situations to reduce every customer's credit to maintain a specious uniformity, or to take unwarranted risks in extending credit. Otherwise, its decisions would always be subject to second-guessing by an expert witness or jury. These results could hardly have been anticipated by the draftsmen of the Robinson-Patman Act[7] — and they are certainly not demanded by this Court's holding in *Catalano*.

Petitioner also claims that the Fourth Circuit has applied a different burden of proof than did the Sixth Circuit in *Bouldis*. Pet. at 12-13 & n.11. Yet the *Bouldis* court did not specify one way or another which party bears the burden of proof; it simply noted in approving summary judgment that the record reflected legitimate reasons for the credit decision in question, while plaintiff had "failed to submit any probative evidence which would suggest that [defendant's] credit decisions were based upon any other factors or motive." 711 F.2d at 1326. This was precisely the conclusion reached by the Fourth Circuit in finding that the Robinson-Patman claim should not have gone to a jury.

Finally, petitioner points to a twenty-year-old decision of the Federal Trade Commission, claiming that it stands for the proposition that "credit discrimination is a discrimination in price." Pet. at 11, citing *Viviano Macaroni Co.*, [1967-70 Transfer Binder] Trade Reg. Rep. (CCH) ¶18,246 (1968), *aff'd*, 411 F.2d 255 (3d Cir. 1969). In *Viviano*, defendant offered a preferred customer a "package" consisting of free merchandise, freight allowances and extended credit terms. The extension of credit was wholly unrelated to any determination of credit worthiness. Instead, it was designed, along with the rest of the package, to induce the customer to carry more of defendant's products. The discrimination was obvious, and had nothing to do with evaluation of credit *risk.*[8]

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[7] The statute deals expressly with other collateral terms affecting net cost such as advertising allowances. *See* 15 U.S.C. §§ 13(c), 13(d), 13(e), 13a.

[8] The Third Circuit, in affirming, did not discuss this issue in any detail.

Notwithstanding petitioner's claims to the contrary, there is no conflict for this Court to resolve. Each circuit applies the same standard, and that standard is a proper one. That being so, granting certiorari on the Robinson-Patman claim would lead to nothing more than a review of the particular facts of this case to determine whether the Fourth Circuit properly applied the standard it articulated — an exercise that would do nothing to further the development of antitrust law.

In any event, the Fourth Circuit's application of the standard was correct. The record was replete with evidence of Lorillard's legitimate reasons for demanding a letter of credit from petitioner — evidence such as petitioner's connections to the Paolella bankruptcy, the transshipment of inventory to petitioner from a Paolella affiliate, the lack of any audited financial statements, petitioner's thin capitalization, and the abrupt increase in volume, and therefore in risk. In contrast, petitioner presented *no* evidence that Lorillard's demand for a letter of credit was based on anything but a genuine concern about petitioner's credit worthiness. Instead the petition (page 8) offers the astounding assertion that Lorillard need not be concerned about credit worthiness because it can spread the risk of default by "factoring the cost into its pricing structure."

2. The Other Issues Raised Are Not Appropriate To A Petition For Certiorari

A. The Expert Witness

The Court of Appeals articulated the most liberal standard possible for the admissibility of expert testimony, *see* App. 17a-18a, and simply found that the testimony tendered here did not measure up.

The substantive question was whether Lorillard had made a *bona fide* credit decision. The expert had no experience with respect to credit decisions. The most she could offer was the ability to read a financial statement. The nature of her testimony confirmed the inadequacy of her experience, since it conspicuously ignored the very things that would be important to a credit department. In any event no reason has been suggested for reanalysis by this Court of her credentials and assertions.

B. Statute of Frauds

Petitioner sought to turn an expression of willingness to sell a "full line" on a "direct basis" into a long term requirements contract. The Court of Appeals interpreted Maryland law as barring such an effort under the Statute of Frauds, since there was no language in the writing relating to quantity. The decision is firmly based on the Maryland precedents, and petitioner points to no real conflict with any reported decision of any kind. The opinion accepts the general rule that parol evidence can be used to add precision to a generally stated quantity term, but not to create a contract where the quantity term expressly required by the Statute is totally omitted. Petitioner does not challenge this rule but asks this Court to decide that references to a "full line" and "direct basis" are a sufficient foundation for parol evidence as to quantity. This is far-fetched on the merits and incomprehensible as a ground for certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Franklin Poul, counsel for respondent, certify that at the time of filing with the Clerk, three copies of the foregoing Respondent's Brief in Opposition were served by first class mail, postage prepaid, upon counsel for petitioner at the following address:

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